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THE UNIVERSITY OF ALBERTA

CONFLUENCE OF THE MENTAL HEALTH AND LEGAL SYSTEMS IN THE PROCESS FOR COMPULSORY CIVIL COMMITMENT IN ALBERTA

BY

© MARGARET ANN SHONE

A THESIS
SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH
IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE
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THE UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES AND RESEARCH

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled CONFLUENCE OF THE MENTAL HEALTH AND LEGAL SYSTEMS IN THE PROCESS FOR COMPULSORY CIVIL COMMITMENT IN ALBERTA submitted by MARGARET ANN SHONE in partial fulfilment of the requirements for the degree of Master of Laws.

. . . .

Supervisor

. . . .

. . . .

12 October 1976

TO MY MOTHER

in memory of her deep concern
for the plight of the
mentally disordered

ABSTRACT

Speaking of two problems which give rise to complaints in the mental health field, the Minister of Social Services and Community Health recently told the Legislature of Alberta:

> One is whether a person is being illegally held in a mental hospital, which I think is one of the things that still persist, despite the improvements because of our Mental Health Act. That does seem to persist.
> [Alberta Hansard, April 30, 1976, 996]

These words attest to the continuing presence of imperfections in the process for compulsory civil commitment.

Interpreted narrowly, the Minister's statement illuminates the importance of stringent procedural safeguards to prevent wrongful violations of personal liberty on the pretext of mental disorder. But, more than this, it exposes the obligation of the Legislature to articulate its policy in respect of involuntary detention for mental disorder--be it in the name of the confined individual's own good or of the greater interests of society--, and then to provide the machinery to ensure that the policy is carried out according to that legislative intent. Indeed, as long as the already chronic controversy surrounding such confinements lingers on, the search must continue for policies and procedures which fairly determine when detention is necessary and when it is not.

The existing law, which is embodied in the Mental Health Act, 1972, entrusts medical professionals with the initial decision to detain a mentally disordered person against his will. Judicial safeguards are not introduced until later, and then only upon application by the patient. They take the form of review by a panel whose membership represents the medical, legal and social interests concerned in the resolution of the issue.

In evaluating the strengths and weaknesses of this scheme, and the philosophical justifications for detention reflected in it, we reap the benefit of past experience by surveying solutions once adopted and identifying the reasons for their subsequent rejection. And, being particularly concerned that sound measures are taken to protect citizens from wrongful interference with their liberty, we look closely at the procedural requirements imposed upon review panels by the Act and at the practices which the writer observed to be followed during her attendance at twelve review panel hearings. These we assess in terms of the fundamental principles of procedural fair play long applied to administrative tribunals by the courts.

Having thus discerned the problems--the fact that our analysis discloses numerous shortcomings in the present law and practice comes as no surprise in light of the Minister's frank admission--the one task remaining will be to make appropriate recommendations for improvement.

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CHAPTER I

INTRODUCTION

Under the law of Alberta, a person who is "suffering from mental disorder" and "in a condition presenting a danger to himself or others" may be hospitalized against his own volition.[1] He need not have been party to any wrongdoing.

In view of the long history of reverence for the liberty of the subject in English law, the deprivation of personal freedom by "formal" admission, as it is euphemistically called, immediately strikes one as extraordinary. The fact that hospitalization is authorized on the strength of no more procedural safeguard than the opinions of two physicians (or a physician and a therapist)[2] makes it seem all the more remarkable. Regarded from the viewpoint of the objecting patient, formal admission constitutes an imprisonment,[3] an involuntary incarceration such as is usually associated with punishment. The fact that the mental hospital community is generally cut off from the view of the public and the press and that opportunities for the abuse of its captive members therefore abound presents another parallel with the criminal sanction of imprisonment. Distressing in the extreme is the realization that a formally confined mental patient has no choice as to his treatment, no matter whether it consists of efforts to modify his behaviour through the use of conditioning techniques, medication, electroshock therapy, or even psychosurgery.

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[1] The Mental Health Act, 1972, S.A. 1972, c. 118, ss. 29(1), 31(1) [hereinafter cited as ACT 1972].

[2] Id. As to the meaning of "therapist," see ch. IV note 194 infra.

[3] "[A]ny restraint put upon the freedom of another by show of authority or force is sufficient to constitute imprisonment." Pon Yin v. Edmonton (1915), 8 W.W.R. 809, 811.

Upon more considered reflection, however, it becomes apparent that the liberty of the subject is just one aspect of compulsory detention for mental disorder. Other elements include the concern of society for the safety of its members from imagined future acts of the allegedly "sick" and "dangerous" person--traditionally the main ground of justification for this intrusion by the state into the private domain of the subject--and the interest of society in the welfare of its less able members.[4]

Two social "systems"--the legal system and the mental health system--are concerned to achieve a balanced adjustment of the competing interests involved.[5] However, the interests emphasized and the approach taken to their fair resolution by each system differ. The legal system, being well-established in our society, needs little introduction. It is manned by such personnel as law enforcement officers, lawyers and judges, and embraces both courts and administrative tribunals. Its forces are experienced in and adept at weighing the interest of the individual in his liberty against that of society when one of its citizens is alleged to have overstepped the bounds of his neighbours' tolerance. The mental health system is of more recent origin. It includes such elements as "health units, pupil personnel services, guidance and alcoholism clinics, voluntary agencies (e.g. V.O.N.), welfare units, family physicians, consultant psychiatrists, active treatment general hospitals, auxiliary hospitals, special hospitals or facilities (e.g. a children's hospital with educational and psychiatric services) and the various rehabilitation units (sheltered workshops, half-way houses, etc.),"[6] and culminates in the total institution--the "regional" mental hospital. The primary objective of this system is the "cure" of mental disorder or, short of cure, its alleviation

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[4] _See_ discussion in ch. II _infra_.

[5] The notion of the interaction between the legal and mental health "systems" is borrowed from ALAN A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION (DHEW [Continued on next page.]

[Continued from p. 2.]
Publication No. (ADM) 75-176, 1975) [hereinafter cited as ALAN STONE].

[6] W. R. N. BLAIR, MENTAL HEALTH IN ALBERTA, A Report on the Alberta Mental Health Study, 1968, 181 (Human Resources Research and Development, 1969) [hereinafter cited as BLAIR REPORT].

and control so as to equip the afflicted person with the means of a more or less normal existence--for his own benefit as well as for that of society.

The question of how, ideally, to coordinate these two systems as they bear on the issue of involuntary civil confinement dominates this thesis. One aspect of this question is the protection of the liberty of the subject from state interference on specious grounds. Also enveloped in the broader concern is the question, recently adverted to by the Minister of Social Services and Community Health,[7] of how to prevent the occurrence of "illegal" detentions once the policy has been legislatively laid down.

Both systems have a legitimate role to play, as the Legislature of Alberta recognized in enacting the Mental Health Act, 1972 which sets up the machinery for their interaction on the problem. We have already remarked upon the power invested in physicians and therapists to authorize the detention initially--an assignment of responsibility which acknowledges the medical exigencies involved. Nor has the importance of injecting a judicial ingredient into the process been overlooked for, although the Act makes no provision for judicial intervention beforehand, it does compel the Minister to establish one or more administrative tribunals called review panels to determine the propriety of the hospitalization at the subsequent request of the patient.[8]

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[7] On April 30, 1976, the Minister informed the Legislature that one of the common complaints about mental health care has to do with "whether a person is being illegally held in a mental hospital, which I think is one of the things that still persist, despite the improvements because of our Mental Health Act. That does seem to persist." ALBERTA HANSARD (April 30, 1976), 996.

The adequacy of this union of medical and legal forces to meet the demands of fair decision is the subject of examination in this thesis. And, because the review panel constitutes the judicial component, we devote considerable space to its function in and contribution to the process. But we are racing ahead. Let us begin by identifying the theoretical justifications offered for compulsory civil commitment.

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[8] ACT 1972, supra note 1, s. 19(1).

CHAPTER II

JUSTIFICATION FOR DETENTION

The Working Paper of the Law Reform Commission of Canada on the Criminal Process and Mental Disorder declares:

> Social policies toward mentally ill accused and offenders need to be fully thought through and clearly articulated. Only then can problems be defined and practical solutions developed. To be effective, procedures must be predicated on clearly expressed and consciously developed social policies. Until basic policy questions are answered, treatment of the mentally disordered in the criminal process will be dominated by often irrational and unacknowledged social objectives, and confused and inappropriate procedures.[1]

Included in the list of policy questions which follows are the questions: "When does a person's mental disorder justify depriving him of his liberty?" and "Where should the balance between freedom of the mentally disordered and the protection of society be struck?"

Stripped to its essence, the message contained in this assertion applies with equal force to detention through civil process. This Chapter is therefore devoted to identifying the various interests involved and the factors which, when regarded from a policy perspective, may influence their relative weights.

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[1] LAW REFORM COMMISSION OF CANADA, THE CRIMINAL PROCESS AND MENTAL DISORDER (Working Paper 14, 1975) 20-21 [hereinafter cited as L.R.C.C. W.P. 14].

A. Conceptual Model

In addressing the question of the propriety of compulsory detention for mental disorder, it is convenient to turn to the analytical theories of sociological jurisprudence and to adopt Julius Stone's particular conceptualization "of the juristic notion of 'interests' as the stuff with which law works.[2] Stone accepts Roscoe Pound's position, "that an interest is 'a demand or desire which human beings either individually or in groups seek to satisfy, of which, therefore, the ordering of human relations in civilised society must take account.'"[3] And he argues that the task of the "adjustment of interests" is "to produce a desired (or at least an acceptable) amount of order, harmony or equilibrium in a pre-existing situation" of conflict between human demands by "a process of compromise and cutting back."[4] These conflicting demands are commonly thought of as individual or social, that is, as claims made "in title of individual life" or "in title of social life," although the two are "by their nature inter-translatable."[5]

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[2] JULIUS STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 164 (1966) [hereinafter cited as JULIUS STONE].

[3] Id. at 167.

[4] Id. at 165.

[5] Id. at 199.

B. Interests in Conflict

Pursuing this theorization,[6] the interest of the individual in preserving his autonomy over his physical person is just one of the interests at stake in the decision whether to confine a person suffering from mental disorder against his will, and the "right" of the individual to fundamental procedural safeguards to secure this interest may have to be adjusted in the face of countervailing social interests.[7] Indeed, under existing Alberta legislation, where the interest of the individual in protection from physical restraint is compromised because of his mental disorder, so too is his immunity from interference with his mind and nervous system--for subjugation to the "treatment" prescribed by others is an automatic consequence of the initial invasion.[9]

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[6] JULIUS STONE, *supra* note 2, does not examine the interplay of interests in compulsory detention for mental disorder by civil process, but his analysis is readily adapted to this purpose.

[7] The word "right" is used here in the sense of "a legal advantage conferred on the claimant to secure an interest which is both recognised and secured by law." *Id.* at 170.

[8] This is an interest which has been protected for centuries by the writ of *habeas corpus*, and its breach gives cause for an action of damages for false imprisonment. *Id.* at 202-04. *See also* Draper, in 3 THE LAW AND MENTAL HEALTH 21-31 (malicious prosecution and false imprisonment), 67-73 (*habeas corpus*) (B. M. Barker, director, under a grant from The Alberta Law Foundation, 1974) [hereinafter cited as BARKER PROJECT].

Two social interests threaten the physical integrity of a person suffering from mental disorder. They are: (1) concern to protect the public from persons who pose a danger to others--the major historical justification for interference, and (2) concern for the health of all members of society, including a person whose illness has allegedly so impaired his judgment that he denies the illness itself, or its extent.[10]

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[9] The concept of "treatment" and the right of the involuntarily detained patient to receive it are topics of current debate falling beyond the scope of this thesis. Yake discusses them in relation to treatment of the mentally ill in Alberta, in 2 BARKER PROJECT, id.

[10] The identification of these two basic social interests is not novel. See, e.g., ROYAL COMMISSION ON THE LAW RELATING TO MENTAL ILLNESS AND MENTAL DEFICIENCY 1954-1957, REPORT, CMND. 169, at 39 (1957) [hereinafter cited as PERCY COMMISSION REPORT]; Note, Civil Commitment of the Mentally Ill: Theories and Procedures, 79 HARV. L. REV. 1288 (1966) [hereinafter cited as HARV. L. REV. NOTE].

As to the impairment of judgment, a good statement is found in Blais, Forced Drug Medication of Involuntarily Committed Mental Patients, 20 ST. LOUIS U.L.J. 100, 113 (1975) [hereinafter cited as BLAIS]:

> In some instances, the very nature of the patient's psychiatric problem renders his judgment regarding treatment suspect. Individuals who have been correctly diagnosed as suffering from a psychotic disorder exhibit, as a distinguishing characteristic of their problem, the inability to recognize and understand the severity of their mental illness. This lack of insight may be the result of a particular patient's confused mental condition or of a refusal by the patient to acknowledge the

[Continued on next page.]

The interest of society in the protection of its members from harm at the hands of another is fundamental to social order:

> In the broadest sense the social interest in peace and order today is at the base of the entire legal order, . . . It is not too much to say that the solicitude for all interests, individual or social, derives in part from the need for orderly and nonviolent disposition of human conflicts. The interest in political, judicial and social institutions, too, derives much of its support from the focal role of these as "social controls" serving this need.[11]

It is, in a very real sense, the extension on a social plane of the interest of the individual in protection against injury to his physical person, to his "mind and nervous system,"[12] or to his "feelings and susceptibilities"[13]--the latter two immunities being less well-established than the former. Thought of in this way, dangerousness in a mentally disordered person may well be interpreted to embrace behaviour which menaces the emotional, as well as the physical, security of others by causing them "anxiety,"

[Continued from p. 9.]
existence of a psychiatric problem. [Footnotes omitted.]

[11] JULIUS STONE, supra note 2, at 294.

[12] Id. at 209-12.

[13] Id. at 212-18. All of Julius Stone's classifications are groupings of convenience, and not revelations of any innate ordering of things.

"humiliation," or "embarrassment."[14] The issue to be resolved on an adjustment of interests is whether or not the individual's behaviour is potentially so dangerous as to justify depriving him of his personal liberty.

The social interest in maintaining the health of the members of society is closely related to the interest in the preservation of life and limb, which in turn is not far removed from the interest in peace and order. Nor is the concern for health a new one. Blackstone speaks of a "right of personal security" which "consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."[15] A few pages later, he adverts to the "preservation of a man's health from such practices as may prejudice or annoy it."[16] Elevated to a social plane, the individual interest translates itself into a social insistence upon good health, and it is not at all unlikely that tolerance of poor health has declined as medical science has advanced. Where a mentally disordered person refuses to submit to treatment, his physical liberty may be overcome by the interest of society in the health of its members. That is to say, the two conflicting interests require adjustment.[17]

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[14] Id. at 213.

[15] 1 W. BLACKSTONE, COMMENTARIES *129 [hereinafter cited as BLACKSTONE].

[16] Id. at *134. The "right to treatment" being propounded today is doubtless a modern outgrowth of the individual interest identified by Blackstone.

C. Means of Adjustment

The Legislature has control over the policy of adjustment as between conflicting interests, and over the machinery to carry out the policy once it has been determined.[18] In the course of arriving at that determination, the question which the Legislature must ask "is always whether the invasion of traditional freedom, with such safeguards as can be devised, is warranted by the prospective gains in human resources, and general security."[19] The answer to this question has perplexed law-makers in the past and continues to be a matter of controversy today. Very often the legislation adopted is not articulate as to the policy itself which must be gleaned from an examination of the machinery provided and the role allotted to the one or more authorities relied upon to make the adjustment.

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[17] For detention on this ground to be defensible, the patient ought to receive treatment leading to the improvement of his mental condition, and not mere custodial care.

[18] At one time, the responsibility for adjusting interests was entrusted to the sovereign, but the significance of the royal prerogative over persons of unsound mind today is little more than historical. *See* ch. IV pp. 42-43 *infra*.

[19] JULIUS STONE, *supra* note 2, at 362. Stone is speaking of detention through criminal process, but his question is equally appropriate to civil process.

Four authorities are frequent participants in the machinery governing detention for mental disorder: (1) the judiciary or a judicial substitute; (2) the medical profession and, more recently, other mental health care workers; (3) Ministers of the Crown, and (4) administrators, whose training tends to be medical. We shall examine their historical roles in Chapter IV. Today, responsibility for the decision to detain is shared by the judicial and medical factions, whose approaches to the decision are dichotomous:

> [T]he medical profession views best interests of the patient as synonymous with possible benefit from treatment, even if under duress, while the legal profession perceives liberty in terms of the individual exercising his freedom to behave as he wishes even if under duress of illness.[20]

The adjustment of individual and social interests is, traditionally, a judicial function within the legal system. Where the instant case is not entirely covered by legislation or a settled rule of law, the court adjusts actual conflicting interests by creative decision, which requires it to weigh one policy against another and, ultimately, to protect one social interest over another. Moreover, judicial precedents of principle and procedure protect individual interests from wrongful intrusion, and their value ought not to be discounted in the mental health field.

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[20] Yake, in 2 BARKER PROJECT, supra note 8, at 24, citing Peszke and Wintrob, Emergency Commitment--A Transcultural Study, 131 AM. J. PSYCHIAT. 36-40.

The specialty of medical professionals, on the other hand, is diagnosis and treatment. Their goal is therapy, and the growing social interest in the health of all members of society has led to phenomenal trust in their wisdom. When the responsibility for judicial decisions is transferred to medical professionals, the traditional legal rules for the protection of the individual tend to undergo a metamorphosis which operates to medical advantage. "Thereapeutic legal rules," as one author has labelled them after transformation, are more "loosely formulated" permitting the maximum uninhibited use of professional judgment in a procedure which is "conducted away from general public scrutiny."[21] The checks and balances of the legal system become abandoned as a result of its abdication of the judicial function.

The judicial and medical components of the process for compulsory detention are not necessarily antithetical in nature. To the contrary, properly defined and exercised, the two roles should form a complement.

D. Limitations

Two factors severely restrict any scheme for the adjustment of conflicting interests relating to mental disorder. One is adequate definition of "mental disorder;" the other is the unpredictability of dangerousness.

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[21] Bean, The Mental Health Act 1959--Some Issues Concerning Rule Enforcement, 2 BRITISH JOURNAL OF LAW AND SOCIETY 225, 228-29 (1975) [hereinafter cited as BEAN].

1. Meaning of "mental disorder"

The existing Alberta legislation defines "mental disorder" to mean "lack of reason or lack of control of behaviour."[22] Draper regards this as "about as satisfactory as defining pneumonia as 'a form of sickness.'"[23] Some critics, notably Thomas S. Szasz, deny its character as a disease, claiming that "'mental illness' . . . is . . . no more than a theory to explain unconventional conduct or belief."[24] Certainly, medical diagnosis has been problematic, and no procedure nor set of criteria yet devised seems to have worked very well.[25] Other commentators defend the right of psychiatrists to disagree, pointing out that judges of the Supreme Court often split. They favour a flexible definition which gives scope to individual medical judgment.[26] The risk is, of course, that the medical decision, already devoid of the usual judicial safeguards, will be rendered without fairly weighing the interest of the individual in his liberty against the social interests concerned, and this hardly seems a satisfactory base on which to rest the long-protected and much cherished liberty of the subject.

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[22] ACT 1972, supra ch. I note 1, s. 1(i). Persons suffering from mental disorder have been variously described over the years as lunatics, idiots, mental defectives, persons of unsound mind, insane, mentally infirm, mentally incompetent, mentally incapacitated, and mentally diseased--and this list does not purport to be exhaustive. Each description carries its own particular meaning.

[23] Draper, 3 BARKER PROJECT, supra note 8, at 12.

[24] Morris and Luby, Civil Commitment in a Suburban County: An Investigation by Law Students, 13 SANTA CLARA LAW. 518 (1973) [hereinafter cited as MORRIS & LUBY].

[25] BLAIR REPORT, supra ch. I note 6, at 292-93.

Throughout this thesis, we accept the reality of "mental disorder," understanding the term in its psychiatric sense of "a disabling disease" which comprehends "a severe disorganization of the brain diagnosed in psychiatry as psychosis and/or organic brain syndrome."[27]

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[26] Bagnell, Update on Mental Illness, IMPERIAL OIL REVIEW, 1976 No. 3, at 3, quoting the opinion of Edward Turner of Toronto's Clarke Institute.

[27] Tanay, Law and the Mentally Ill, 22 WAYNE L. REV. 781, 782 (1976) [hereinafter cited as TANAY]. Despite the Szasz school of thought, Tanay boldly asserts that "the existence of severe disabling mental disease is not a subject of controversy either in science or in common sense experience"--a statement with which the writer tends to agree.

For a judicial construction not of "mental disorder" but of the words "mental illness" as used in the definition of "mental disorder" in s. 4 of England's Mental Health Act 1959, 7 & 8 Eliz. II. c. 72, see W. v. L. (mental health patient), [1973] 3 All E.R. 884, 890, per Lawton L.J. who read them as "ordinary words of the English language" having "no particular medical significance" and which therefore "should be construed in the way that ordinary sensible people would construe them." On this construction, an ordinary sensible person would be as qualified as a [Continued on next page.]

2. Prediction of dangerousness to others

Inherent in the social concern for the protection of the public from the dangerous propensities of persons suffering from mental disorder by incarcerating them are three assumptions:

(1) that the meaning of dangerousness is conceptually clear and does not require more precise definition;

(2) that the incidence of dangerous behaviour in the mentally disordered is greater than the incidence within society as a whole: society does not countenance the confinement of any other group for the prevention of undetermined and uncertain future violent or harmful conduct--quite the opposite, only strictly proven past acts receive this censure; and

(3) that the potential dangerousness of any one person is capable of accurate, or at least reasonably accurate, prediction--an expertise imputed to the medical profession.

All three assumptions are of questionable validity. First, the meaning of dangerousness is ambiguous at best, as is apparent from the following questions: how serious must the "dangerous" conduct be? is it to be measured by a criminal or civil standard? does it mean physically violent only or does it extend to verbally threatening? does it

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[Continued from p. 16.]
physician to recognize that degree of "lack of reason or lack of control of behaviour" which constitutes "mental disorder" in Alberta.

embrace conduct toward property as well as persons? does it encompass insidious behaviour or only overt acts? how likely must it be to occur?[28]

Second, there is "lack of a clear-cut association between mental illness (or any particular form of mental illness) and dangerous behaviour."[29]

Third, there are no reliable clinical or other techniques for the ascertainment of dangerousness which, according to statistical evidence, psychiatrists consistently overpredict with well below 50% accuracy.[30] This is especially true of predictions made in respect of persons with no past record of dangerous behaviour.[31] Moreover, laymen and courts may predict as accurately as professionals.[32] In the opinion of one observer, doctors assume dangerousness if the mental disorder is severe,[33] a practice which has no place in the determination of dangerousness to others although it may be defensible on humanitarian grounds where the test is dangerousness to self.[34]

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[28] The Quebec Court of Appeal has associated dangerousness with the infliction of physical violence, as contrasted with the infliction of social embarrassment upon others. Dame L. v. Larue, [1959] Que. Q.B. 549.

[29] Diamond, The Psychiatric Prediction of Dangerousness, 123 U. PA. L. REV. 439, 447-50 (1974) [hereinafter cited as DIAMOND]; L.R.C.C. W.P. 14, supra note 1, at 18.

[30] DIAMOND, id. at 444-45; L.R.C.C. W.P. 14, supra note 1, at 19; ALAN STONE, supra ch. I note 5, at 27-36; Wexler, Scoville et al., The Administration of Psychiatric Justice: Theory and Practice in Arizona, 13 ARIZ. L. REV. 1, 96-100 (1971).

[31] ALAN STONE, supra ch. I note 5, at 32, citing Kozol et al., The Diagnosis and Treatment of Dangerousness, 18 CRIME & DELIN. 371, 383 (1972).

The lack of evidence connecting dangerousness to mental disorder, and the failure to devise techniques for its prediction in individual instances of mental disorder if and when such a propensity does in fact exist suggest that the social interest in protection of the public from the dangerous acts of mentally disordered persons is misconceived. This postulation is, of course, overly simplistic. In the writer's admittedly limited experience of observation, doctors and review tribunals, civil and criminal, are understandably hesitant to risk the release of patients who have committed, or who threaten, particularly heinous acts of violence such as killing and sexual assault. The point is that by and large society has been deluded by its own ignorance into believing in the intimacy of mental disorder and dangerous inclination when, in fact, dangerousness to others may be discounted in most cases. Setting it aside as a prime contender in the arena of conflicting interests, the real essence of the task emerges: to adjust the interest of the individual in his personal freedom with the interest of society to ensure the health of each and every member.[35] The medical profession takes

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[32] Id. at 33, relying on Hakeem, Prediction of Parole Outcome, 52 J. CRIM. L. CRIMINOLOGY AND POLICE SCIENCE 145 (1961); and Rappeport, Lassen, and Grunewald, Evaluation and Followup of State Hospital Patients who had Sanity Hearings, 118 AM. J. PSYCHIAT. 1078 (1962).

According to TANAY, supra note 27, psychiatrists do not claim the ability to predict dangerousness, and the myth that they have predictive skills derives from the expectations of the legal system. See ch. V note 20 infra.

[33] BEAN, supra note 21, at 227.

[34] "Dangerousness to self" comes within the social interest in the health of individual members of society. Its bounds are also ambiguous, hindering efforts at prediction. As ALAN STONE states, "It is unclear whether the harm must be suicide, the danger of getting lost or physically injured, or merely of occasionally making imprudent economic or sexual decisions." Supra ch. I note 5, at 48. We add bodily neglect to this list.

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[35] The acceptance of "the good of the individual" as the basis for his detention constitutes a refutation of the argument proposed by John Stewart Mill in his essay, On Liberty, which is popularly referred to in discussions of this sort. See, e.g., CYRIL GREENLAND, MENTAL ILLNESS AND CIVIL LIBERTY 11 (Occasional Papers on Social Administration No. 38, 1970) [hereinafter cited as GREENLAND]; Shuman, The Right to be Unhealthy, 22 WAYNE L. REV. 61, 80 (1975) [hereinafter cited as SHUMAN]; Houlgate, Rights, Health, and Mental Disease, 22 WAYNE L. REV. 87, 88 (1975) [hereinafter cited as HOULGATE]. It was Mill's contention:

> That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinion of others to do so would be wise, or even right. These are reasons for remonstrating with him, or reasoning with him,

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its stand in the conflict as society's representative to uphold the latter interest, bespeaking more than ever the importance of a judicial component in the machinery for the adjustment of interests.

Our survey, in Chapter IV, of the existing machinery reveals that considerable reliance is now placed on the medical profession. But before going on to look at the Alberta legislation governing detention for mental disorder, we pause for a word about the procedural safeguards which the legal system traditionally has employed in the protection of the liberty of the individual.

[Continued from p. 20.]

> or persuading him, or entreating him, but not for compelling him with any evil in case he do otherwise.

GREENLAND, id. Significantly, however, Mill himself "intended this thesis to apply only to the voluntary choice or consent of a mature and rational being," excluding children and the insane from its absolute ambit. HOULGATE, id.

CHAPTER III

FUNDAMENTALS OF PROCEDURE

As the reader will recall, we introduced this thesis with an expression of surprise that the personal autonomy ordinarily held in such great esteem could be removed with the ease possible under the Mental Health Act, 1972. In this Chapter, we investigate the standards of procedural fairness ordinarily applicable to proceedings which may result in the deprivation of liberty.

A. Meaning of "Natural Justice"

Under criminal process, a trial governed by the most protective of substantive law principles and the most stringent of procedural rules must precede the meting out of the punishment of imprisonment.[1] The right to a fair hearing is likewise a fundamental concept of civil process, most especially in a case which threatens the liberty of the person.[2] Indeed, one judge has observed that "[p]rocedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied.[3]

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[1] Notwithstanding the existence of these safeguards, the Law Reform Commission of Canada has described the criminal law as "society's most destructive and intrusive form of intervention." LAW REFORM COMMISSION OF CANADA, A REPORT TO PARLIAMENT ON MENTAL DISORDER IN THE CRIMINAL PROCESS 2 (1976).

In Canada, and elsewhere in British law, the basic rules of procedural fair play in civil proceedings are known as the principles of "natural justice"[4]--principles which courts honour in their own proceedings and which they impose, in varying measure, on other bodies performing judicial functions. The content of the concept of natural justice fluctuates with the circumstances in which it is invoked, and its requirements therefore elude precise

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> [2] Statutes which encroach on the rights of the subject, whether as regards person or property, are subject to a strict construction in the same way as penal Acts. It is a recognized rule that they should be interpreted, if possible so as to respect such rights, and if there is any ambiguity the construction which is in favour of the freedom of the individual should be adopted.

P. B. MAXWELL, ON THE INTERPRETATION OF STATUTES 251-52 (12th ed. 1965).

[3] Shaughnessy v. United States, 345 U.S. 206 (1953) (Jackson J.), cited in H. W. R. WADE, ADMINISTRATIVE LAW 171 (3d ed. 1974) [hereinafter cited as WADE].

[4] For those who do not like the expression "natural justice," S. A. DESMITH offers the choice of "substantial justice," "the essence of justice," "fundamental justice," "universal justice," "rational justice," "the principles of British justice," "justice without any epithet," or "fair play in action." JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 135 (3d ed. 1973) [hereinafter cited as DESMITH].

definition. Nevertheless, its two basic rules--the entitlement of a person whose rights are affected by a decision peculiar to him to a hearing in respect of it and the absence of bias in the decision-maker--are firmly entrenched.

B. History

1. Influence of Magna Carta

English law knows a long tradition of respect for the liberty of the subject.[5] The first Magna Carta, King John's Charter of 1215, granted to all free men of the kingdom and their heirs forever sixty-three liberties, the most significant of which in modern times are Caps. 39 and 40:

> (39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the law of the land.
>
> (40) To no one will we sell, to no one deny or delay right or justice.[6]

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[5] The right of personal liberty is one of Sir William Blackstone's three "principle or primary articles" of the natural rights and civil liberties of every Englishman. BLACKSTONE, *supra* ch. II note 15, at *129.

[6] G. R. C. Davis (transl.), reproduced with certain minor alterations in I. JENNINGS, MAGNA CARTA AND ITS INFLUENCE IN THE WORLD TODAY 44-47 (British Information Services, 1965) [hereinafter cited as JENNINGS]. According to

[Continued on next page.]

With a few minor amendments, these became Cap. 29 of King Henry's Charter of 1225,[7] the authoritative text for legal purposes.[8] Important developments of Magna Carta transpired over the years, not the least of which was the introduction of the words "due process of law" into a 1354 version of Cap. 29:

> ITEM, That no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law.[9]

This enactment provided the precedent for the 5th and 14th Amendments to the Constitution of the United States.[10]

[Continued from p. 24.]
the preamble, "It sets out to convey the sense rather than the precise wording of the original Latin." *Id.* at 44.

[7] 9 Henry III. The text reads:

> No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.

25 Edw. I. cap. 29 (1297), in 1 THE STATUTES OF THE REALM 117 (1810, reprinted 1963) [hereinafter cited as STATUTES OF THE REALM]. It is taken from Tottel's sixteenth century printing of the *inspeximus* of 1297 which was enrolled on the Statute Roll. JENNINGS, *Id*. at 10-11.

[8] JENNINGS, *supra* note 6, at 10.

[9] 28 Edw. III. cap. 3. 1 STATUTES OF THE REALM, *supra* note 7, at 345.

[10] JENNINGS, *supra* note 6, at 17.

Whatever the significance of Magna Carta in feudal times, and it should not be discounted,[11] the Charter has come to be regarded as a milestone in British and therefore in Canadian history. Two reasons may be advanced why this is so. First of all, the Charter set out the royal obligations in considerable detail, thereby giving substance to the "implication that even the king was under the law."[12] Secondly, Cap. 29 contained the promise of procedural fair play, the "natural justice" of later jurisprudence, and the influence of this promise has endured. In Jennings' words,

> Chapter 29 of Magna Carta is in itself of no great value. It is important only because its principles have been worked out by legislation and common law. Liberty of the person is secured not by a declaration of right but by adequate remedies before impartial tribunals whose decisions are respected and enforced.[13]

That is to say, the principles of natural justice became fundamental principles of the common law.

2. Relationship to "natural law"

The "liberties of England" did not originate with Magna Carta.[14] According to Blackstone, who credits the observation of Sir Edward Coke in 2 Inst. proem., the Charter of 1215 "contained very few new grants; but . . . was for the most part declaratory of the principal grounds of the fundamental laws of England."[15] The reference to the "fundamental laws of England" may be taken to mean those laws founded on "natural law"--"originally the Stoic philosophical conception of a universal ideal of good conduct upon which all law should be founded and which . . . ought not to be overriden [sic] by any other laws however made."[16] The concept of the supremacy of "natural law" or, sometimes, "the law of God" formed part of the law of feudal England ("the law of the land" as it is referred to in Cap. 29), and underlay the development of the common law. It retained jurisprudential credibility over into the eighteenth century.[17]

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[11] King Henry's Charter of 1225 was confirmed at least fifty-five times between 1225 and 1416. Id. at 11.

[12] Id. at 12, 42.

[13] Id. at 39.

[14] "[I]ndeed there were earlier charters--one of which, that issued by King Henry I in 1100, supplied the precedent for the Charter of 1215 ..." Id. at 12.

There is no doubt that each of the two limbs of "natural justice," used in its current sense of procedural fair play, is itself rooted in antiquity. Justinian stated the rule that no man shall be judge in his own cause in his

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[15] BLACKSTONE, supra ch. II note 15, at *127-28.

[16] H. H. MARSHALL, NATURAL JUSTICE 6 (1959) [hereinafter cited as MARSHALL]. Hence, the binding of both the king and his subjects under Magna Carta.

[17] *Id*. at 7-10.

Institutes,[18] and the principle was incorporated into the common law--cases in support of the principle appear in the Year Books.[19] The origin of the audi alteram partem rule has even been attributed to the beginning of time.[20] Certainly, the rule stems from early times[21]--a passage from Seneca's tragedy, the Madea, stating the principle has often been quoted in the judgments of English courts;[22] it is said to have been upheld in Magna Carta;[23] and, as with the rule against bias, supporting cases appear in the Year Books and thereafter.[24]

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[18] Book 4, title 5, law 1. Id. at 16. See also D. J. HEWITT, NATURAL JUSTICE 16 (1972) [hereinafter cited as HEWITT].

[19] MARSHALL, supra note 16, at 16-17; HEWITT, id. at 16-18.

[20]

> [T]he objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. . . . even God himself did not pass sentence upon Adam, before he was called upon to make his defence. Adam (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also.

R. v. Chancellor of Cambridge (otherwise known as Dr. Bentley's Case), (1723), 1 Str. 557, 567, per Fortescue, J.

[21] MARSHALL, supra note 16, at 17-20; HEWITT, supra note 18, at 92-109.

[22] MARSHALL, id. at 18.

[23] "Lord Coke appears to have subscribed to that view when he said (Co. Inst. IV, 37): '. . . by the statutes of Mag. Cart. ca. 29, 5 E 3 Cap. 9 and 28 E 3 Cap. 5 no man ought to be condemned without answer, etc.'" Id. at 18.

Marshall has demonstrated, from an examination of common law cases, that the two principles of modern "natural justice" are linked with the antecedent concept of "natural law":[25] on the one hand, the judgment in Day v. Savadge[26] associates the rule against bias with the laws of nature; on the other hand, the judgment in R. v. Chancellor of Cambridge[27] associates the principle of *audi alteram partem* with the laws of God which were identified with the law of nature in Calvin's Case.[28] He concludes his analysis by submitting that

> . . . natural justice . . . is that part of natural law which relates to the administration of justice. That is to say, the two principles that no man shall be judge in his own cause and that both sides must be heard are so necessary for the fair administration of justice that they have been accepted as fundamental for this purpose.[29]

Natural justice is, then, the legacy of natural law.

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[24] *Id.*

[25] *Id.* at 11-12. Indeed, the expressions "natural justice" and "natural law" were used interchangeably in the past. *Id.* at 6.

[26] (1614), Hobart 85.

[27] (1723), 1 Str. 557.

[28] (1608), 7 Co. Rep. 1a.

[29] MARSHALL, *supra* note 16, at 12. He adds:
[Continued on next page.]

C. Significance Today

Seventeenth century case law held that natural law takes supremacy over Acts of the legislature.[30] By 1842, however, judicial reliance on natural law had plainly given way to the doctrine of the supremacy of Parliament--the doctrine upon which the constitutions of England and Canada are based.[31]

Despite its decline, the extensive historical application of the concept of natural law is telling in that to this day, absent a clear legislative expression of intent to the contrary, the court will apply the principles of natural justice to judicial and administrative action

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[Continued from p. 29.]

> It would seem that the term natural justice, confined as it now is to the two procedural principles mentioned above, is one of the few recognisable relics of the concept of natural law remaining in the common law of England.

Id. at 13. Other scholars have noted a similar connection between natural justice and natural law. See e.g., Schwartz, Administrative Procedure and Natural Law, 28 NOTRE DAME LAW. 169 (1953), also citing JOSEPH CHARMONT, THE RENAISSANCE OF NATURAL LAW (1910).

[30] See e.g., Calvin's Case (1608), 7 Co. Rep. 1a; Dr. Bonham's Case (1610), 8 Co. Rep. 107a; Day v. Savadge (1614), Hobart 85. The concept was relied upon by one judge as late as 1824. Forbes v. Cochrane (1824), 2 B. & C. 448, 469, per Best, J. See generally MARSHALL, id. at 6-15.

[31] Logan v. Burslem (1824), 4 Moore P.C. 284, 296. MARSHALL, id. at 14. In contrast the constitutional enactment of the Bill of Rights in the United States (the Fifth and Fourteenth Amendments contain due process clauses derived from Cap. 29 of Magna Carta) enables the courts to declare legislation invalid. JENNINGS, supra note 6, at 38.

and as rules of statutory interpretation.[32] In the words of one author:

> Natural justice has had to look for a new foothold, and has found it as a mode not of destroying enacted law but of fulfilling it. Its basis now is in the rules of interpretation. The courts may presume that Parliament, when it grants powers, intends them to be exercised in a right and proper way. Since Parliament is very unlikely to make provision to the contrary, this allows considerable scope for the courts to devise a set of canons of fair administrative procedure, suitable to the needs of the time.[33]

The accuracy of this observation is born out by judicial commentary. For example, in one case, although the Parliament of Canada had obviously granted the Labour Relations Board "very large powers and discretion," Wells, J. A. of the Ontario Court of Appeal rejected the argument that these were "quite arbitrary powers," stating:

> . . . I would prefer to say that it had been given a very wide discretion in the exercise of its powers, but in my view that discretion does not place it above the general law of the land or enable it to disregard it. In exercising its discretion in my opinion, it is bound by, amoung [sic] other things, the powers which are compendiously brought together under

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[32] The fundamental principles of the common law can be applied to administrative action, and they can be applied as rules of interpretation--Cap. 29 has been quoted in such cases in the present century--to Acts of Parliament or statutory instruments, on the ground that 'Parliament could not have intended' than an interpretation contrary to fundamental principles be observed.

JENNINGS, _id_. at 38.

[33] WADE, _supra_ note 3, at 174-75.

> the term, natural justice. If Parliament had intended to remove the necessity of observing this salutary rule, that it must do natural justice, it would have, in my opinion, expressed its intention in much clearer and more explicit language.[34]

In his classic article on the subject of statutory construction, John Willis discusses a number of canons of legislative intent, or presumptions, to which a court may resort in order to "mould legislative innovation into some accord with the old notions."[35] The most important of these for purposes of this thesis, the presumption against interfering with the personal liberty of the individual, is also the most firmly established:[36]

> Personal liberty is no mean part of our common law heritage, and legislatures are ordinarily chary of interfering with it: in ordinary

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[34] R. v. Canada Labour Relations Board, Ex parte Martin [1966] 2 O.R. 684, 686.

[35] Willis, Statute Interpretation in a Nutshell, 16 CAN. B. REV. 1, 17 (1938) [hereinafter cited as WILLIS]. He argues that although the presumptions are by origin "devices for ascertaining the intent of the legislature," they have become by present practice "weapons of judicial control" of that intent. Id. at 17-18.

[36] Willis mentions two other presumptions which are relevant to social reform legislation and to this thesis. The first is the presumption against taking away a common law right, which "seems to be falling into disuse. When the courts do make use of it they tend to emblazon it with rhetorical glorification of the rights of Englishmen." Id. at 20. The second is the presumption against barring the subject from the courts. Willis remarks that this presumption "has come into increasing use; it is usually accompanied by oratory about justice and the rule of law, and by denunciation of despotism and bureaucracy." Id. at 22.

> cases the presumption always has been, and still is, a sound canon of legislative intent. . . .
>
> With few exceptions, the courts . . . have unflinchingly applied the presumption at all times and in all cases. The courts regard themselves as the guardians of freedom . . . It is in cases involving personal freedom that judicial hostility to executive action is most marked.[37]

We may conclude that, acting as "guardians of freedom" and unless legislation unquestionably restrains them from doing so, the courts will apply the principles of natural justice to an administrative body whenever its decision may affect the right of the subject to his liberty. Moreover, the Legislature of Alberta has endorsed the policy adopted by the courts by incorporating it into the Alberta Bill of Rights, which Act guarantees "the right of the individual to liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by the due process of law" unless, as a matter of construction, the law in question has been "expressly declared by an Act of the Legislature" to operate "notwithstanding The Alberta Bill of Rights."[38]

Thus armed with the presumption in favour of the application of the principles of natural justice, we move on to look at the provisions of the Mental Health Act, 1972 and of its predecessors.

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[37] _Id_. at 22-23.

[38] S.A. 1972, c. 1, ss. 1(a), 2. The impact of this Act on the provisions of the ACT 1972, _supra_ ch. I note 1, is the subject of further consideration in Chapter V. _See_ pp. 112-16 _infra_.

CHAPTER IV

THE ALBERTA LAW

A. Past

There are two branches of development of the law relating to mentally disordered persons. Each has resulted in its own machinery for the adjustment of conflicting individual and social interests. The first, of which the Mentally Incapacitated Persons Act[1] is the direct descendant, is the history of the exercise of the royal prerogative over persons of unsound mind. The focus of this branch has been the protection of property, although measures for the protection of the person are included. We will deal with it only briefly because full jurisdiction today rests with the Supreme Court and therefore the liberty of the individual is safeguarded by the strictures of true judicial process.

Our concern is with the adequacy of the machinery for compulsory detention developed as a consequence of the progression of events along the second branch of history, of which the Mental Health Act, 1972[2] is the present-day legacy. This is the history of the legislative correction of social ills which befell persons lying outside the protection of the prerogative power as it came to be exercised, and we will review it in detail in the hope that our assessment of the existing machinery may profit from the experience of the past. (The figure traces the legislative developments along each branch which are important for our purposes.)

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[1] R.S.A. 1970, c. 232.

[2] ACT 1972, supra ch. I note 1.

1. Royal Prerogative over Persons of Unsound Mind

a. Nature and extent of the prerogative

We begin our historical survey by travelling back in time, as we did in the previous Chapter, to feudal days and Magna Carta. The liberties of Magna Carta were propositions of law which curtailed the powers of the king by his own agreement. Magna Carta did not otherwise affect the balance of mutual rights and obligations established by customary law between the king and his subjects. That is to say, the prerogatives of the king, being the converse of the liberties of the subject, remained otherwise unimpaired.[3]

These prerogatives were not without general limitation. In Charles I's reign (1625-1649), Sir Henry Finch wrote:

> The king hath a prerogative in all things, that are not injurious to the subject; for in them it must be remembered, that the

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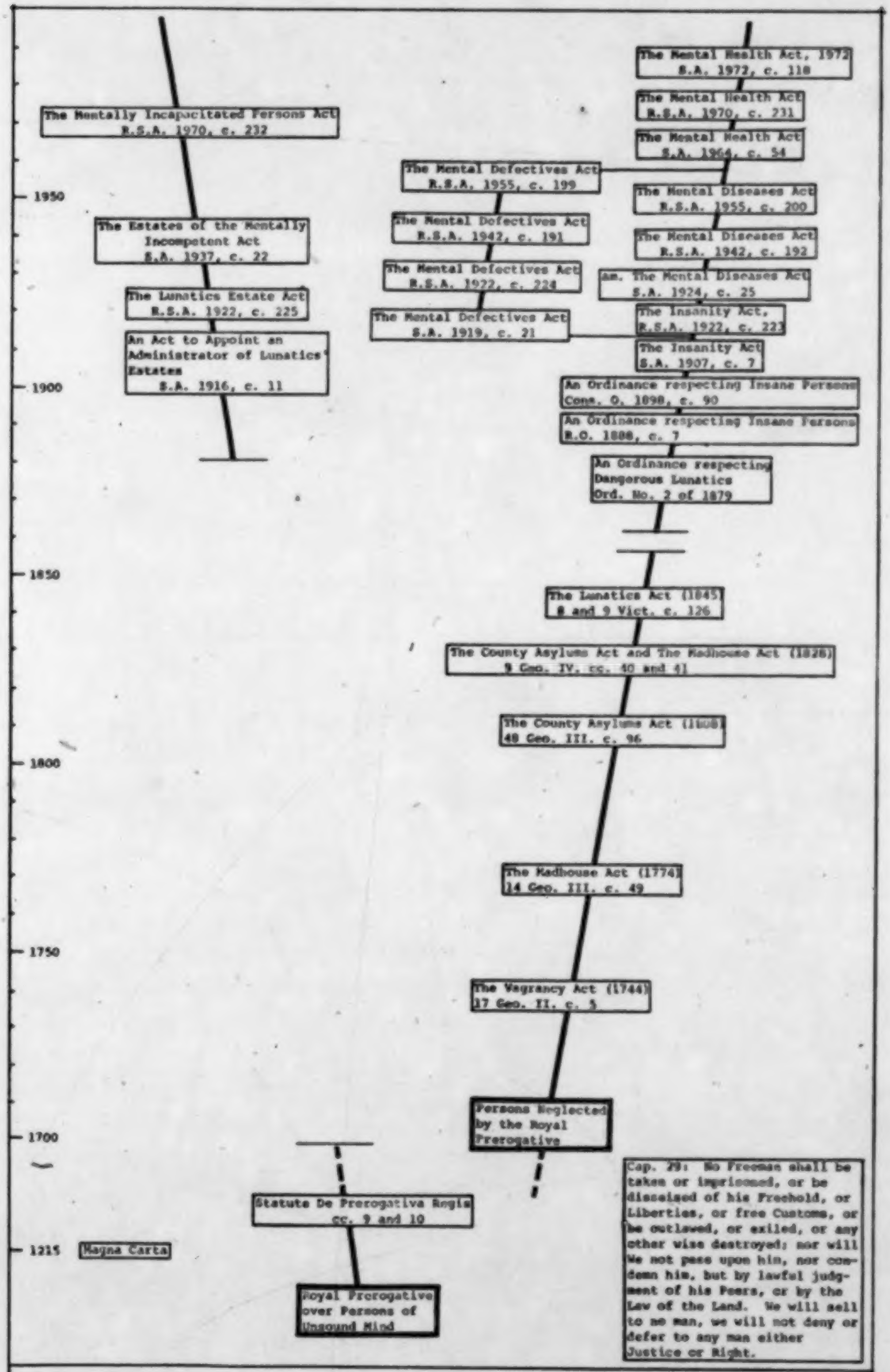
[3] JENNINGS, *supra* ch. III note 6, at 13-14.


1950
1900
1850
1800
1750
1700
1215
The Mentally Incapacitated Persons Act
R.S.A. 1970, c. 232
The Estates of the Mentally Incompetent Act
S.A. 1937, c. 22
The Lunatics Estate Act
R.S.A. 1922, c. 225
An Act to Appoint an Administrator of Lunatics' Estates
S.A. 1916, c. 11
The Mental Health Act, 1972
S.A. 1972, c. 118
The Mental Health Act
R.S.A. 1970, c. 231
The Mental Health Act
S.A. 1964, c. 54
The Mental Defectives Act
R.S.A. 1955, c. 199
The Mental Diseases Act
R.S.A. 1955, c. 200
The Mental Defectives Act
R.S.A. 1942, c. 191
The Mental Diseases Act
R.S.A. 1942, c. 192
The Mental Defectives Act
R.S.A. 1922, c. 224
am. The Mental Diseases Act
S.A. 1924, c. 25
The Mental Defectives Act
S.A. 1919, c. 21
The Insanity Act,
R.S.A. 1922, c. 223
The Insanity Act
S.A. 1907, c. 7
An Ordinance respecting Insane Persons
Cons. O. 1898, c. 90
An Ordinance respecting Insane Persons
R.O. 1888, c. 7
An Ordinance respecting Dangerous Lunatics
Ord. No. 2 of 1879
The Lunatics Act (1845)
8 and 9 Vict. c. 126
The County Asylums Act and The Madhouse Act (1828)
9 Geo. IV, cc. 40 and 41
The County Asylums Act (1808)
48 Geo. III. c. 96
The Madhouse Act (1774)
14 Geo. III. c. 49
The Vagrancy Act (1744)
17 Geo. II. c. 5
Persons Neglected by the Royal Prerogative
Statute De Prerogativa Regis
cc. 9 and 10
Magna Carta
Royal Prerogative over Persons of Unsound Mind

Cap. 29: No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.

FIGURE: CHRONOLOGY OF MAJOR LEGISLATIVE DEVELOPMENTS IN THE ALBERTA LAW RELATING TO MENTAL DISORDER (commencing with its British legislative antecedents)

> king's prerogative stretcheth not to the doing of any wrong.[4]

Blackstone stresses the point when he says that "the prerogative of the crown extends not to any injury: it is created for the benefit of the people, and therefore cannot be exerted to their prejudice."[5]

One of the king's prerogatives extended to persons of unsound mind. Its origin and scope are uncertain but it probably was first exercised by Henry III toward the end of his reign (1216-1272)[6] in response to the abuse by feudal lords of their powers of wardship. The Statute De Prerogativa Regis, which gave the king custody of the person and lands of idiots and lunatics, recognizes the prerogative as existing and restricts its operation.[7]

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[4] L. Finch 84, 85, in BLACKSTONE, supra ch. II note 15, at *238.

[5] Plowd. 487, in BLACKSTONE, id. at *246.

[6] 1 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 261 (1903) [hereinafter cited as HOLDSWORTH]. This is a matter of controversy; the prerogative may have been first exercised by Edward I (1272-1307). See H. S. THEOBALD, THE LAW RELATING TO LUNACY 1 (1924) [hereinafter cited as THEOBALD].

[7] This "statute" is printed in Ruffhead as 17 Edw. II (1339) St. I. cc. 9, 10. THEOBALD, id. However it may not be a statute at all but merely a private work or a document produced on the instructions of the king. HOLDSWORTH, id., n. 3, citing Maitland, 6 ENGL. HIST. REV. 367. In any event, it is of uncertain date. Holdsworth places it between 1255 and 1290 whereas Theobald, relying on 1 F. POLLOCK AND F. W. MAITLAND, THE HISTORY OF ENGLISH LAW 464 (2d ed. 1898) [hereinafter cited as POLLOCK AND MAITLAND], [Continued on next page.]

No matter in what spirit the prerogative was intially invoked, at the outset it proved to be a profitable one[8]--the king was entitled to the profits from the estate of an idiot (a born fool) subject only to the right of the idiot to be maintained out of them. In the case of lunacy, however, the guardianship took on the nature of a

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[Continued from p. 38.]
claims that it belongs to the early years of Edward I (1272-1307).

It is printed in STATUTES OF THE REALM, supra ch. III note 7, at 226, among statutes of uncertain date following 17 Edw. II. St. 2. Caps 9 and 10 read as follows:

> The King shall have the Custody of the Lands of natural Fools, taking the Profits of them without Waste or Destruction, and shall find them their Necessaries, of whose Fee soever the Lands be holden; and after the Death of such Idiots he shall render it to the right Heirs, so that such Idiots shall not aliene, nor their Heirs shall be disinherited.
>
> Also the King shall provide, when any, that beforetime hath had his Wit and Memory happen to fail of his Wit, as there are many per lucida intervalla, that their Lands and Tenements shall be safely kept without Waste and Destruction, and that they and their Houshold shall live and be maintained competently with the Profits of the same, and the Residue besides their Sustentation shall be kept to their Use, to be delivered unto them when they come to right Mind; so that such Lands and Tenements shall in no wise be aliened; and the King shall take nothing to his own Use. And if the Party die in such Estate, then the Residue shall be distributed for his Soul by the Advice of the Ordinary.

[8] BLACKSTONE calls it a "fiscal prerogative" and discusses it as "the eighteenth and last branch of the king's ordinary revenue." Supra ch. II note 15, at 302-03.

duty[9]--the king had no interest in the estate of a lunatic (a person who had once had his wits but lost them); instead, he had an obligation to make provision out of the profits for the maintenance of the lunatic and his family.[10] Over the years idiocy merged into lunacy[11] so that ultimately the prerogative came to be exercisable by the Crown, "not for the benefit of the Crown, but as a parental and protective jurisdiction for the benefit of the lunatic."[12] Further evidence of the changing nature of the prerogative comes from the fact that the jurisdiction once vested in the person of the Lord High Treasurer by express delegation of the Crown was early passed to the Chancellor.[13]

The officer of state to whom the prerogative power was delegated had jurisdiction to commit the custody of the person and estate of an idiot or lunatic to another who was called a committee.[14] Jurisdiction to make the committal was conditioned on the prior ascertainment of idiocy or lunacy by a jury of twelve--the peers of the person alleged to be of unsound mind--[15]on the return of the common law writ de idiota inquirendo.[16] Inquisitions were invariably held with the assistance of a jury right up until 1853; nor were juries abandoned even then for English legislation passed in that year permitted the alleged lunatic to demand one.[17] Moreover, inquisitions were public proceedings.[18]

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[9] POLLOCK AND MAITLAND describe the fact that this guardianship was not profitable as "a novel and noteworthy thing" for the times. Supra note 7, at 481.

[10] Beverley's Case (1603), 4 Co. Rep. 123b, contains a thorough exposition of the differences in the law applicable to idiots and lunatics. See also THEOBALD, supra note 6, at 1-4; HOLDSWORTH, supra note 6, at 261-62; BLACKSTONE, supra ch. II note 15, at 302-04.

[11] This was largely due to the aversion of juries to the consequences of idiocy and their reluctance to find that verdict, although Pope attributes it also to the "clemency of the crown." THEOBALD, id. at 3; HOLDSWORTH, id. at 262 & n. 1.

[12] THEOBALD, id. at 4. The word "lunatic," as used in this passage, includes an idiot.

[13] HOLDSWORTH, supra note 6, at 262.

An important point emerges here: from the beginning the power of the state to interfere with the liberty of a person thought to be of unsound mind was subject to procedural safeguards. And these safeguards were present notwithstanding the ostensible purpose of the prerogative--that being the protection of the lunatic.

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[14] 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 608 (12th ed. 1877) [hereinafter cited as STORY]. Two persons might be so designated, one to serve as committee of the person and the other as committee of the estate.

[15] JENNINGS asserts that trial by jury was not in Cap. 29 of Magna Carta, but that later lawyers read it in and it became a requirement at the common law. Supra ch. III note 6, at 28.

[16] BLACKSTONE, supra ch. II note 15, at 303 and 305.

[17] THEOBALD, supra note 6, at 29-30.

[18] Id. at 29. See also JENNINGS, supra ch. III note 6, at 28.

If the royal prerogative over persons of unsound mind was originally defined in very broad terms of paternalistic protection, theoretically some trace of it could remain today. In the view of at least one author it existed in England as late as 1924, notwithstanding the enactment of legislation conferring specific powers in respect of lunacy.[19]

In Alberta, however, the Appellate Division of the Supreme Court held in 1922[20] that the combined effect of sections 15(b) and 36 of the Judicature Act[21] and the Act to Appoint an Administrator of Lunatics' Estates[22] was clearly "to extinguish all rights of the Crown over lunatics or their property dependent upon prerogative and to vest those rights in, and to place lunatics and their property wholly under the jurisdiction of, this Court."[23] Today, the successors to these statutory enactments[24] continue to assign to the Supreme Court that jurisdiction once shared by the Chancellor acting as the personal delegate of the Crown, the Chancellor acting in his official capacity as the keeper of the king's conscience, and the Court of the Chancery.[25]

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[19]
> . . . it has always been held that under the Crown's Prerogative there is an inherent jurisdiction to do what is for the benefit of a lunatic, though it may not be possible to point to any statutory authority for the particular act. In this direction the extent of the Royal Prerogative is only limited by the discretion of the person who exercises it.

THEOBALD, supra note 6, at 7.

[20] Monticello State Bank v. Baillee, [1922] 2 W.W.R. 894.

[21] S.A. 1919, c. 3. Section 15(b) was first enacted as s. 10(b) of S.A. 1907, c. 3; and s. 36, as s. 425 of N.W.T. Ord. No. 6 of 1893. (Sections 424-438 of the latter Ordinance, most of which were borrowed from R.S.M. cap. 58, regulated proceedings in lunacy.)

[22] S.A. 1916, c. 11.

b. Disposition of custody of the person

The principal motivation which gave rise to the royal prerogative over persons of unsound mind was concern for the protection of estates.[26] Complex rules governing the management of property grew up in lunacy, and most of the legislative remodelling of the prerogative dwells on the property aspect.[27]

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[23] Monticello State Bank, supra note 20, at 897-98, per Beck, J.A.

[24] The Mentally Incapacitated Persons Act, R.S.A. 1970, c. 232; and The Judicature Act, R.S.A. 1970, c. 193, ss. 16(b) and 33 which read as follows:

> 16. For the purpose of removing any doubt, . . . it is declared that the Court has the like jurisdiction and powers that by the laws of England were, on the 15th day of July in the year 1870, possessed and exercised by the Court of Chancery in England in respect of
>
> (b) all matters relating to . . . idiots or lunatics and to the estate of . . . idiots or lunatics.
>
> 33. In the case of lunatics and their property and estates, the jurisdiction of the Court includes, subject to the Rules of Court, the jurisdiction that, in England, is conferred upon the Lord High Chancellor by a Commission from the Crown under the Sign Manual.

[25] STORY, supra note 14, at 608; THEOBALD, supra note 6, at 59. If the royal prerogative were still to exist in Alberta, query who would have jurisdiction to exercise it?

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[26] Although the emphasis is on property, the concern is with its protection in the interests of the welfare of the lunatic himself and not with its preservation for the benefit of family members or others who may foresee making a future claim to it. Therefore, an application for the appointment of a committee which "lays more stress on the property than on the person of the lunatic" is ill-founded. Re Clark (1892), 14 P.R. 370, 371; Re Connell (1904), 4 O.W.R. 95, 96; Re Howell (1919), 17 O.W.N. 47, 48. In a more recent case, Disbery, J. of the Saskatchewan Queen's Bench quoted with approval "the following passages from the judgment delivered by Lord Davey in In re McLaughlin, [1905] A.C. 343, 74 L.J.P.C. 70, at p. 347:

> 'It must be remembered that this particular jurisdiction is one of some peculiarity and difficulty. It exists for the benefit of the lunatic, and the guiding principle of the whole jurisdiction is what is most for the benefit of the unhappy subject of the application.'

At pp. 350-351:

> 'Their Lordships will only add that they feel quite as strongly, as it was properly urged upon them by counsel for the appellant, that the interest of persons alleged to be of unsound mind and of all His Majesty's subjects ought to be jealously protected against any attempts of designing people or of people acting innocently but mistakenly, to place either their persons or their property under restraint; * * * .'"

Re Cochran (1964), 47 W.W.R. 669, 670.

[27] Custody of the person is mentioned in just two of the 24 sections in the Mentally Incapacitated Persons Act, R.S.A. 1970, c. 232: section 3 declares the power of the court to make orders "for committing the custody of persons of unsound mind" to a committee; and section 23 declares the power of the court to commit the custody of a person who is mentally infirm by reason of "disease, age, habitual [Continued on next page.]

The history of the arrangements made for custody of the person is less well documented, although by the time Beverley's Case[28] was heard, it had already been established that the Statute de Prerogativa Regis gave the king the custody and protection of the body as well as of the goods, chattels, lands and tenements of idiots and lunatics. Blackstone writes that "at least for temporary disorders," it was "usual to confine the unhappy objects in private custody under the direction of their nearest friends and relations." If the disorder became permanent, it was "proper to apply to the royal authority to warrant a lasting confinement."[29] But inadequate provision was made for the supervision of the committee of the person. The committee had absolute control:

> He could take the lunatic into his own custody, he could place him in the custody of any other person, he could place him in an institution, whether a public asylum, a registered hospital or private house, or, as it afterwards became, a licensed house. But it was not possible that the Lord Chancellor should take cognizance of the care and treatment of the lunatic, when once a committee of the person had been appointed. No doubt, if any improper treatment was brought

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[Continued from p. 44.]
drunkenness, the use of drugs or other cause" to a committee. Custody of the person may not be committed without custody and management of that person's estate, although custody and management of the estate of a mentally infirm person may be committed without custody of his person.

[28] 4 Co. Rep. 123b.

[29] BLACKSTONE, supra ch. II note 15, at 305.

> to his notice he could take steps to stop it, but opportunity to do this rarely arose.[30]

This situation was remedied in England by the introduction, in 1833,[31] of visitors. The writer suspects, however, that the situation in Alberta today is much the same as it was in England prior to 1833 except that it is the court and not the Chancellor which is ill-equiped to supervise the care of the committed person.[32]

Containment of the authority of the committee of the person is a problem deserving of study. Nevertheless, it falls outside the scope of this thesis for two reasons: first, the resolution of the issue lies beyond the control of the mental health system; and second, a judicial hearing complete with procedural safeguards precedes the deprivation of liberty, for the Mentally Incapacitated Persons Act confers jurisdiction on the Supreme Court of Alberta to make the prerequisite determination of unsoundness of mind or of mental infirmity, and to grant the order for committal. Indeed, remaining true to its ancestry, the

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[30] THEOBALD, supra note 6, at 55.

[31] 3 & 4 Wm. IV. c. 36, s. 2.

[32] The Mentally Incapacitated Persons Act, R.S.A. 1970, c. 232, neither defines the duties nor qualifies the powers of the committee of the person, nor does it provide for his supervision.

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legislation goes so far as to entitle a person alleged to be of unsound mind to demand a jury trial of that issue.[33]

Being so contented, we will take leave altogether of the branch of historical development of the law relating to mentally disordered persons which culminates in the Mentally Incapacitated Persons Act, and concentrate our attentions on the fate of that other segment of society comprised of persons who were neglected in the exercise of the prerogative power and incarcerated without an inquisition.

2. Persons Neglected in the Exercise of the Prerogative Power

a. Eighteenth and nineteenth century England

The protection of the royal prerogative over persons of unsound mind was withheld from large numbers of persons[34] whose plight was not brought squarely before the Lord Chancellor. By and large, these were unpropertied persons, or persons whose estates were insufficient to bear the costs of administration in lunacy--for as we have seen the prerogative power was directed more toward the preservation of property than toward the safekeeping of the suffering individual. But a propertied person might also be detained in an asylum[35] or in private custody without the benefit of an inquisition.[36]

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[33] R.S.A. 1970, c. 232, s. 9.

[34] THEOBALD postulates that "their numbers must always largely have exceeded the number of lunatics so found by inquisition." Supra note 6, at 55.

"Interference with personal liberty could be justified at common law only if it was necessary either for the welfare of the individual interfered with, or for the safety of the public."[37] The common law provided redress by way of an action for unlawful imprisonment; however, an imprisoned person was hardly in a position to pursue his remedy. The common law writ of habeas corpus[38] was also available at the instance of a person claiming to have been wrongfully detained, "but this means was not often employed, and such was the secrecy with which the proprietors of private madhouses surrounded their activities, that it was seldom useful."[39] Other controls on wrongful detention were lacking until late in the eighteenth century. Meanwhile, abuses were abundant.[40]

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[35] The notorious London institution of Bethlem, financed by public subscriptions and legacies was operated as an asylum from 1377 onward. K. JONES, LUNACY, LAW, AND CONSCIENCE 1744-1845: THE SOCIAL HISTORY OF THE CARE OF THE INSANE 11 (1955) [hereinafter cited as JONES, LUNACY, LAW, AND CONSCIENCE].

[36] "[N]o public records were kept at this period" of persons confined in private madhouses or as single lunatics "and the whole object of such confinement was secrecy." Id. at 11.

[37] THEOBALD, supra note 6, at 65.

[38] The development of the writ of habeas corpus, which protects the liberty of the subject by "enabling a court to inquire into the lawfulness of any imprisonment and, if it is unlawful to set the prisoner free," was a consequence of Magna Carta in that a form of the writ was invented to provide a remedy for unlawful imprisonment contrary to Cap. 29. JENNINGS, supra ch. III note 6, at 33.

The Madhouses Act of 1774[41] is usually taken to have ushered in the great era of Parliamentary reform of mental health administration in England.[42] This act and its

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[39] K. JONES, A HISTORY OF THE MENTAL HEALTH SERVICES 11 (1972) [hereinafter cited as JONES, MENTAL HEALTH SERVICES].

[40] THEOBALD says of private madhouses prior to 1774:

> When once a person had been placed in a private asylum it was not difficult for the keeper to prevent him from having any access to the outer world, and a person who had disappeared into a lunatic asylum was very often not heard of again. No one had any right to enter a private asylum against the proprietor's wish. This secrecy had the usual result. Patients were wrongfully detained; they were treated with great cruelty; they were often insufficiently clothed and underfed; they were subjected to the terrors of solitary confinement and to methods of mechanical restraint which rivalled in cruelty the torture chambers of the middle ages. During the course of the eighteenth century the treatment of lunatics in private asylums had become a public scandal.

Supra note 6, at 65. The situation was hardly better for insane persons confined under the Poor laws, the criminal law and the vagrancy laws in workhouses, poorhouses and prisons, or for those confined in Bethlem asylum or as single lunatics. JONES, LUNACY, LAW, AND CONSCIENCE, supra note 35, at 9-25.

[41] 14 Geo. III. c. 49. See JONES, id. at 31-40; THEOBALD, supra note 6, at 65-68.

[42] JONES begins her history with the Vagrancy Act of 1744, 17 Geo. II. c. 5, for in that year "those suffering from insanity were for the first time recognized as

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successors (notably, (1) the County Asylum Act of 1808;[43] (2) the County Asylums Act and the Madhouse Act of 1828;[44] as repealed and reenacted in 1832;[45] and (3) the Lunatics Act of 1845,[46] forecast by the Act of 1842)[47] introduced controls on the detention of persons for mental disorder and were responsible for great improvement in the conditions which beset mentally disordered persons after confinement. The changes wrought are ably described in the passage below:

> In the eighteenth century persons could be sent to the miseries of lunatic asylums at the will of any unscrupulous person without redress, but this state of things had been to a great extent reformed before the middle of the nineteenth century. The Act of 1845 contained an elaborate series of provisions to prevent the admission of persons into asylums without proper safeguards. A person, not a pauper, could only be sent to an asylum upon what was called an order signed by a relation

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[Continued from p. 49.]
requiring separate legislative provision," albeit as yet another "group of people whose activities had to be restrained for the common good." LUNACY, LAW, AND CONSCIENCE, supra note 35, at 31 and 28.

[43] 48 Geo. III. c. 96. See JONES, id. at 70-78.

[44] 9 Geo. IV. cc. 40, 41.

[45] 2 & 3 Wm. IV. c. 107. See JONES, LUNACY, LAW, AND CONSCIENCE, supra note 35, at 133-44; THEOBALD, supra note 6, at 68-71.

[46] 8 & 9 Vict. c. 126.

[47] 5 & 6 Vict. c. 87. See JONES, LUNACY, LAW, AND CONSCIENCE, supra note 35, at 170-95; THEOBALD, supra note 6, at 71-75.

> or some other person supported by two medical certificates, and a pauper could only be sent to an asylum by an order signed by a Justice of the Peace or an officiating clergyman, with the relieving officer, or an overseer of the union supported by one medical certificate. These provisions . . . were found unsatisfactory. The so-called order had nothing of a judicial nature about it. It was a mere authority which might be signed by anyone, and the power to make such orders was sometimes abused. On the other hand, doctors had become reluctant to sign the certificates, because they were often subjected to actions by persons detained as lunatics on their certificates. Persons interested in the subject were divided into two camps; there were the medical men who desired early and easy treatment of persons afflicted with mental disease, and at the same time demanded protection against the risks they ran in certifying persons as lunatics, and there were the lawyers who attached more weight to the liberty of the person than to the possibility of a cure by facility for compulsory confinement.[48]

Judicial authorization of the detention of a lunatic became a requirement with the enactment of the Lunacy Act Amendment Act of 1889,[49] and the provisions of this Act were carried forward into the consolidated Lunacy Act of 1890.[50] In the view of one scholar, ancient history closed and modern history began with these Acts.[51]

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[48] THEOBALD, id. at 78. "[T]he lunatic so found by inquisition being under the protection of the Crown remained outside this legislation." Id. at 55.

[49] 52 & 53 Vict. c. 41.

[50] 53 Vict. c. 5, amended in some details in 1891 by 54 & 55 Vict. c. 65.

[51] THEOBALD, supra note 6, at 82.

However, none of the English legislative reforms reviewed above had much impact on the development of mental health law in the Canadian North West to which place we shall now transport ourselves.

b. Transition to the North West Territories

To be in force in the North West Territories, an English law had to be "applicable to the Territories,"[52] and "[t]he courts have taken the word 'applicable' . . . to refer not to the mere physical possibility of applying the English law or legislation, but its reasonable suitability to the new territories."[53]

As of 15 July 1870--the date adopted in 1886 by the Parliament of Canada for the reception of English law into the Territories--[54] England boasted the urban populace to support an industrialized economy, sizable government, well-developed system of justice, and numerous social institutions. By way of contrast, in the sparsely-settled

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[52] North-West Territories Act, 49 Vict. c. 25, s. 3 (Can.).

[53] Cote, The Introduction of English Law into Alberta, 3 ALTA. L. REV. 262, 266-67 (1964) [hereinafter cited as COTE].

[54] 49 Vict. c. 25, s. 3 (Can.). This date had been adopted by the Legislative Assembly of the Territories in 1884, but the ordinance (Ord. No. 26 of 1884, s. 1) "was probably invalid because it conflicted with (Can.) 32-33 Vict. c. 3, s. 5, which presumably continued in force English law as of 2 May 1670." COTE, id. at 264 & n. 16.

Territories the fur trading era of the past two hundred years was just coming to an end. It had not yet been supplanted by the agrarian economy which was to follow, stimulated by the building of the trans-Canada railway and the immigration of settlers brought to the prairies by rail in the late nineteenth and early twentieth centuries. Law enforcement and justice were still rough. That is to say, there were great variations between social and economic conditions in England and the territorial North West.

The English civil law relating to the detention of persons for mental disorder (excepting lunatics so found by inquisition), as embodied in the Lunatics Act of 1845,[55] was specifically directed to remedying conditions as they existed in England. The provisions for a permanent Lunacy Commission to license private madhouses and to send out visitors to these houses four times a year were not suitable to a region where the only detention facilities were jails; nor were the requirements for the authorization of detention by medical practitioners viable in a local where doctors were a rarity. The Lunatics Act, at least in the main, did not therefore come into force in the Territories.

There is an even more conclusive reason why the Lunatics Act did not apply in the Territories. The date of 15 July 1870 for the reception of the English law into the Territories was struck in 1886. However, an exception was made of laws which had been "repealed, altered, varied, modified, or affected . . . by any ordinance of the Lieutenant-Governor in Council."[56] A territorial ordinance providing for the imprisonment of dangerous lunatics had been passed in 1879.[57] Although the ordinance (its provisions are described on pages 55-56) smacks of the criminal law, the writer regards it as the territorial substitute for the administrative solutions found in England for the detention of persons suffering from mental disorder. In other words, given the rugged mode of life prevailing among the widely-scattered populace of the vast territorial frontier, the ordinance drew the most practical possible balance between the interests of society and the mentally disordered person, and thereby replaced the provisions of the Lunatics Act.

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[55] 8 & 9 Vict. c. 126.

Much of the English law did, of course, come into force in the North West Territories. For example, the common law remedy of habeas corpus, as modified by statute,[58] was received and, unlike most other English laws, did not have to be proven to be in force before it was applied.[59]

The course of legislative developments in the North West Territories and Alberta is described below. (Appendix

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[56] 49 Vict. c. 25, s. 3 (Can.).

[57] Ord. No. 2 of 1879.

[58] Habeas Corpus, 1 & 2 Phil. & M. c. 13; 31 Car. II. c. 2 (Imp.). See COTE, supra note 53, at 266.

[59] COTE, id.

1 summarizes the same developments in chart form, and the reader may find it helpful to refer to the chart in conjunction with the following discussion.)

c. Legislative developments in the Territories and Alberta

i. Insane (mentally diseased) persons (1879-1964)

Ordinance No. 2 of 1879 set out a simple scheme for the apprehension of any person who, on an information laid before a justice of the peace, was "suspected and believed to be, insane and dangerous to be at large," and had "exhibited a purpose of committing some criminal offence."[60] Upon apprehension a justice of the peace was to hear evidence as to the alleged insanity. In so doing, he could adjourn the enquiry as necessary;[61] he also had power to compel the attendance of witnesses as in a summary conviction case.[62] If after hearing the evidence he was satisfied that the prisoner was "insane and dangerous to be at large"[63] the justice was directed to commit the prisoner to goal there to remain until the "pleasure of the Lieutenant-Governor" was known or until the prisoner was "discharged by law."[64] He also had to report to the Lieutenant-Governor, who had power to order further enquiries.[65] Otherwise, the prisoner was to be discharged.[66]

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[60] Ord. No. 2 of 1879, s. 1.

[61] Id. s. 2.

[62] Id. s. 5.

[63] The justice was not required to address the issue of whether or not the prisoner had "exhibited a purpose of committing some criminal offence." In other words, confinement depended on insanity plus dangerousness, and not on criminality.

The apparent purpose of the Ordinance was the confinement of the individual for the safety of society.[67] This simple, but nevertheless judicial, approach to the social problem of mental disorder survived throughout the territorial period (indeed, it outlasted the territorial period by fifty-nine years), but not without some significant modifications. In 1888, the requirements of dangerousness and suspected intent to commit a criminal act disappeared from the law, meaning that any person could be imprisoned for insanity alone.[68] In 1889 the scope of the enquiry into the alleged insanity of the prisoner was extended to include certain evidence which would be useful in defraying the cost of detention.[69] An amendment in 1897 required the justice to report to the Attorney General instead of the Lieutenant Governor.[70] These changes were incorporated into the Consolidated Ordinances of 1898, which also amended the reference to the "prisoner" to "the person so brought before the justice."[71] The first flicker of interest in the welfare of the insane person came in 1899. An amendment in that year permitted the justice to commit the insane person to gaol "or other safe custody."[72]

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[64] The remedy of habeas corpus was available for this purpose. See pp. 48-49, 53 and note 38 supra.

[65] Ord. No. 2 of 1879, s. 3.

[66] Id. s. 4.

[67] In this, it was similar to the Vagrancy Act of 1744, 17 Geo. II. c. 5, s. 20 of which read in part:

> It shall and may be lawful for any two or more Justices of the Peace where such Lunatick or mad Person shall be found, by Warrant under their Hands and Seals, directed to the Constables, Churchwardens and Overseers of the Poor of such Parish, Town or Place, to cause such Persons to be apprehended and kept safely locked up in some secure Place . . . as such Justices shall appoint; and (if such Justices find it necessary) to be there chained.

Quoted in JONES, LUNACY, LAW, AND CONSCIENCE, supra note 35, at 29.

Chapter 90 of the Consolidated Ordinances of 1898, and the amendment of 1899, remained the law until their repeal in 1907.[73] In that year, the newly-created Alberta Legislature passed "An Act respecting Insane Persons,"[74] which preserved the territorial provisions for committal by warrant of a justice of the peace, but once again with some important changes: the requirement of "dangerous to be at large" was reintroduced as a ground for commitment;[75] the inquiry into the alleged insanity of the person brought before the justice was to include the evidence of a "duly qualified medical practitioner;"[76] it was also to include evidence as to "the danger to be apprehended from his being at large";[77] any adjournment of the inquiry was limited to three days;[78] in addition to gaol or other safe custody, the justice was empowered to commit an insane and dangerous person "to the custody of any relative or friend;"[79] and, finally, proceedings resulting in discharge were to be reported to the Attorney General.[80]

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[68] An Ordinance respecting Insane Persons, R.O. 1888, c. 7.

[69] Ord. No. 1 of 1889, s. 1. The justice was to hear evidence adduced with reference "to his [the prisoner's] residence for at least the six months previous to the enquiry, to his calling or profession, to his means of support, to the fact of his being married or not; and also as to whether or not the said prisoner, if committed under the provisions of this Ordinance, will be sent back to his former residence, and at whose cost."

[70] Ord. No. 38 of 1897, s. 47(2).

[71] Cons. O. 1898, c. 90, ss. 2, 3.

[72] Ord. 1899, c. 24, s. 1.

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[73] S.A. 1907, c. 7, s. 30. The Alberta Act, 4 & 5 Edw. VII. c. 3, s. 16 (Can.), had provided that the law existing in the Territories was to continue in the new province until modified by legislation. COTE, supra note 53, at 265.

[74] S.A. 1907, c. 7.

[75] Id. ss. 2, 4.

[76] Id. s. 3(a).

[77] Id. s. 3(b). Note that the Legislature did not treat the issue of dangerousness as being within the particular auspices of the medical profession.

[78] Id. s. 3(2).

[79] Id. s. 4.

The committal was subject to review by a judge of the Supreme Court of Alberta on the application, within four days, of any relative or friend who believed it "to have been unwarranted and not justified by the evidence given."[81] The review was to consist of an examination of the person committed as insane and of the evidence and other papers relating to the committal, and could take in the hearing of further evidence.[82] Where he was satisfied that the person was not insane or, though insane, not dangerous to be at large, the judge could grant a certificate which operated as authority for the discharge of the person from custody.[83]

The Act of 1907 also contained a number of administrative refinements of the process of compulsory detention. Power to order the removal of any person committed by warrant of a justice of the peace to an asylum rested with the Attorney General, and his order constituted the authority for admission.[84] The Attorney General also had power to order the release, "either on trial, temporarily or permanently," of a person so confined in an asylum.[85] Otherwise, the detention endured until, "in the opinion of the superintendent of the asylum" the patient was "restored to reason" and "competent to act for himself."[86] The patient was, however, permitted to be removed on trial by his friends with the consent of the superintendent--and this was termed a "temporary discharge."[87]

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[80] *Id.* s. 5.

[81] *Id.* s. 10.

[82] *Id.* s. 10(2).

[83] *Id.*

The 1922 Revised Statutes reproduced the 1907 Act as amended without change of any great moment.[88] But major reforms followed shortly thereafter. In 1924, amendments were passed which revealed a shift in the philosophy of detention for mental disorder away from confinement for the protection of society and toward therapy for the sick person, and which allotted the medical profession an enhanced role in the decision to detain a person suffering from mental disorder. The short title of the Act was changed from "The Insanity Act" to "The Mental Diseases Act,"[89] and the word "asylum" was expunged in favour of the word "hospital".[90]

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[84] Id. s. 8. Section 22 provided that until provision was made for the "care and maintenance" of insane patients within Alberta, they were to be sent to some asylum in Manitoba or some other province, in accordance with arrangements made by the Lieutenant Governor in Council.

[85] Id. s. 8(2). In 1910, this subsection was amended to give the Attorney General power to order the release of a person detained "in any gaol, guard room or other place of confinement" pursuant to the warrant of a justice of the peace. S.A. 1910, c. 2, s. 16.1.

[86] S.A. 1911-12, c. 4, s. 21. The Act had previously provided that the detention should last until the confined person was discharged "under the provisions of this Act" (S.A. 1907, c. 7, s. 23); however, with the exception of the aforementioned power of the Attorney General to order the release of a patient, the Act made no provision for discharge by administrative process.

[87] S.A. 1907, c. 7, s. 24. The warrant of committal issued by the justice of the peace continued in force for six months during any such temporary discharge.

[88] R.S.A. 1922, c. 223. By this time, Alberta had its own facilities for detention and references in the 1907 Act to confinement in asylums elsewhere were therefore omitted.

Two modes of admission joined the existing provisions for detention pursuant to the warrant of the Attorney General. These were voluntary submission to treatment, and medical certificate.[91] In the former case, the superintendent had the authority to direct the reception and detention of a voluntary applicant where he was satisfied that the applicant's mental condition warranted it.[92] If, during his detention, a voluntary patient became insane and dangerous to be at large, he was to be brought before a justice of the peace for committal by warrant.[93] The latter procedure was more complex: a justice of the peace was empowered to direct the conveyance of a person to a hospital provided that two "legally qualified medical practitioners" had, on separate examination, certified that the person should be so confined, and provided that the hospitalization had the prior approval of the superintendent. All three methods of admission were available where any person was "believed to be in need of treatment for mental diseases" such as was provided in a hospital.[95]

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[89] S.A. 1924, c. 25, s. 2.

[90] Id. ss. 8, 9, 10, 11, 12(a), 13, 14, 15, 16(a), 17, 18, 19, 20, 21, 22(a),(b), 24, 25(b), 26(a). "Hospital" was defined to mean "the Provincial Hospital for Mental Diseases, or the Oliver Hospital for Mental Diseases, or any other hospital which may be designated as a mental disease hospital by the Lieutenant Governor in Council." Id. s. 3.

[91] Id. s. 5.

[92] Id.

The superintendent lost his authority to discharge a patient admitted under warrant of the Attorney General--a warrant of the Attorney General was now required for the release of these patients--but he was assigned responsibility for the discharge of every other patient who had been "restored to reason" and was "competent to act for himself."[96] And he could discharge into the custody of friends or relatives any patient who in his opinion [was] sufficiently recovered and whose further recovery [would] be benefited by such removal."[97] A voluntary or certified patient or any of his friends or relatives could, with the approval and consent of the Minister of Health, appeal the direction or retention of the superintendent to a judge of the Supreme Court of Alberta.[98]

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[93] Id. s. 7.

[94] Id. s. 5. This provision remained in force without substantial change until the Mental Health Act of 1964 came into effect. The duty of the justice of the peace under it is somewhat obscure. See ch. V pp. 128-29 infra. An equivalent section was interpreted by the British Columbia Court of Appeal in Williams v. Ballam (1964), 48 W.W.R. 182, but it sheds little light on the Alberta position because the British Columbia statute explicity required the judge personally to examine the person alleged to be mentally ill whereas the Alberta statutes were consistently silent on this point.

[95] Id.

In 1925, a fourth mode of admission was added to the Act, and that was by order of the Minister of Health for the purposes of observation and inquiry into a person's mental condition. The order could only be made on the application of the person himself or of "some close relative" or where the Minister was satisfied "by the evidence of two legally qualified medical practitioners" of its propriety. Detention was not to exceed thirty days.[99] Once hospitalized, subject to his right to appeal with the approval of the

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[96] Id. s. 22.

[97] Id. s. 23. This section was replaced in 1929 by a provision enabling the Attorney General, "with the advice in writing of the superintendent" to permit a patient to be "absent on trial as long as he [the Attorney General] thinks fit." S.A. 1929, c. 34, s. 4. A second subsection allowed the superintendent "of his own authority" to permit absence for not more than three days. Three days was subsequently increased to ten days. S.A. 1931, c. 62, s. 3.

[98] S.A. 1924, c. 25, s. 12(b).

[99] S.A. 1925, c. 46, s. 3.

Minister of Health, the patient fell under the jurisdiction of the superintendent.

The admission provisions introduced in 1924 and 1925 remained in force until 1964. No significant alterations in the admission and detention philosophy established in the 'twenties occurred in either the 1942 or the 1955 revision.[100] In 1942, the words "mentally diseased" replaced the word "insane" throughout the Act,[101] thereby changing the grounds for committal by the warrant of a justice of the peace to "mentally diseased and dangerous to be at large," and effecting a like change in respect of any judicial review of the committal, or of the direction or detention of the superintendent. In 1952 the superintendent was authorized to extend from time to time, up to a limit of six months, the ten-day period for which he could permit a patient to be absent from the hospital,[102] and in 1955 a justice of the peace was allowed to commit to a hospital as an alternative to gaol or the custody of any relative or friend or other safe custody.[103] The 1955 revision reorganized lengthy sections into appropriate subsections or separate sections, and in doing so tidied up some of the language. In 1956, the provisions relating to admission by medical certificate were rewritten, but not so as to affect their substance.[104] That same year saw the addition of a provision for the apprehension of an escaped patient without a warrant within sixty days of his escape. The patient was to be returned to the hospital without delay.[105]

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[100] R.S.A. 1942, c. 192; R.S.A. 1955, c. 200.

[101] R.S.A. 1942, c. 192, ss. 5, 8(1)(a), 9(1),(2),(3), 10, 15(1),(2), 19(1), 30, 32.

[102] S.A. 1952, c. 53, s. 2(a).

[103] S.A. 1955, c. 38, s. 38.

Until this time, the judiciary had played a substantial role in the process of compulsory detention. That role was soon to be greatly reduced in deference to the growing concerns of the medical profession about the adverse effect of the court process on the mental condition of many persons in dire need of care and treatment. But before looking at the evolutionary provisions of the Mental Health Act passed in 1964,[106] we shall describe a line of legislation which developed alongside the Mental Diseases Acts in respect of mental defectives, and which was repealed at the same time.

ii. Mentally defective persons (1919-1964)

In 1919 separate legislation was passed to govern the control and institutionalization of "any person afflicted with mental deficiency from birth, or from an early age, so pronounced that he is incapable of managing himself or his affairs, and who is not classified as an insane person within the meaning of the Insanity Act."[107] The Mental Defectives Act gave the Minister of Education authority to approve the placing of a mentally defective person in an institution in accordance with the wish of anyone having responsibility for his charge and control.[108] Where after inquiry the Minister felt a person should be in an institution but his parents, guardians, or others having control of him refused to give consent, or where no one was in control, the Minister could bring proceedings before a justice of the peace for a determination of mental deficiency.[109] The hearing procedure and the powers of the justice were similar to those provided under the Insanity Act.[110] If it appeared to the justice that the person was mentally defective, he was to assign him to "the care of some relative, friend, or other person" and report forthwith to the Minister.[111] The Minister then had the choice of staying further proceedings or sending the mental defective to an institution on probation pending further investigation and such final order as was appropriate in the circumstances.[112] The ministerial authority was transferred to the Minister of Health in 1922.[113]

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[104] S.A. 1956, c. 29, s. 2 (am. R.S.A. 1942, c. 192, s. 4(4),(5)); s. 6 (am R.S.A. 1955, c. 200, s. 6(1),(2)).

[105] S.A. 1956, c. 29, s. 3 (am. R.S.A. 1942, c. 192, s. 29); s. 7 (am. R.S.A. 1955, c. 200, s. 34).

[106] S.A. 1964, c. 54.

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[107] The Mental Defectives Act, S.A. 1919, c. 21, s. 2. The Insanity Act did not define an "insane person".

[108] Id. s. 6.

[109] Id. s. 7.

[110] Id. ss. 8-12.

[111] Id. s. 13.

The Act was continued by the Revised Statutes of 1922 wherein the words following "or his affairs," in the definition of a "mentally defective person" were amended to refer to a person "who is not insane and dangerous to be at large."[114] In 1923, the Provincial Training School for Mental Deficiency was named as an institution "for the detention, care and training of mentally defective persons," and the superintendent acquired the authority which had formerly belonged to the Minister of Health to approve the admission of a mental defective on the application of anyone responsible for his charge and control.[115] Another amendment provided that a mentally defective person committed to an institution by order of the Minister after a finding of mental deficiency by a justice of the peace could not be removed except by order of the Minister.[116] Subject to this exception and with the consent of the superintendent, the parent or guardian could remove a person on one month's notice. Before giving his consent, the superintendent was to ascertain "on due inquiry" that it was not "to the interest of the mentally defective person," or "in the interest of the public," that he remain in the institution.[117]

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[112] *Id.* A similar scheme was considered by the British Columbia Court of Appeal in Albert v. Attorney-General for British Columbia (1964), 48 W.W.R. 87. However, whereas under the Alberta legislation, the justice of the peace made the finding of mental deficiency and the Minister ordered the subsequent disposition, the B.C. legislation empowered the magistrate to grant an order admitting the mentally defective person directly to a school for mental defectives. The Court in the Albert case upheld the issue of a writ of *mandamus* directing the superintendent of the school to comply with the judge's order.

[113] S.A. 1922, c. 4, s. 11.

[114] R.S.A. 1922, c. 224, s. 2(a).

[115] S.A. 1923, c. 52, ss. 2, 3 (*as am.* 1925, c. 47, s. 2), 4.

In 1925, the Minister (in the case of a person admitted by his order) or the superintendent (in other cases) was permitted to parole a mentally defective person to the care of some responsible person who then came under an obligation to advise the superintendent, upon his request, as to "the general welfare, conduct and place of residence of the paroled person."[118] Failure to meet this obligation could result in the arrest and reconveyance of the paroled person to an institution.[119] In 1929, provision was made for committal, on the application of the superintendent, "to the charge of some person in a private dwelling-house" which thereupon became an institution for purposes of the Act.[120] In 1933, the superintendent was granted the authority to discharge a person who was "capable of earning a legitimate livelihood and conforming to the law," and who no longer had "the power of procreation."[121] To avoid apprehension and reconveyance to an institution, the discharged person had to make such reports as the superintendent prescribed, comply with any conditions he was directed to comply with, earn a legitimate living, conform to the law, and not pursue any mode or manner of living or behaviour which appeared to the superintendent to be undesirable.[122] Finally, in 1937, "mentally defective person" was redefined to mean "any person in whom there is a condition of arrested or incomplete development of mind existing before the age of eighteen years, whether arising from inherent causes or induced by disease or injury."[123]

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[116] Id. s. 5.

[117] Id.

[118] S.A. 1925, c. 47, s. 5 (as am. 1933, c. 29, s. 2(a)).

[119] Id.

[120] S.A. 1929, c. 19, s. 2.

Apart from the reorganization of some sections into subsections and the tidying up of language in the 1955 revision, as had happened to the Mental Diseases Act, these provisions remained unaltered until their repeal in 1964.[124]

iii. Mentally disordered persons (1965-1972)

With the enactment of the Mental Health Act in 1964, Alberta entered a new era in the history of mental health care and forcible detention. The tendency in previous years had been to send persons suffering from mental disorder to public institutions in out-of-the-way locations. The legislation governing mentally diseased persons did not particularly encourage their return into the community: the authority to permit temporary absences from the hospital was granted only cautiously to the superintendent,[125] and provision was made for ease of apprehension and reconveyance of a patient who had been removed on temporary discharge, or escaped.[126] Once institutionalized the detention, apparently even of a patient who had voluntarily submitted himself to treatment, was subject to the authority of the superintendent.[127] And, as we have seen, very strict controls were placed on the behaviour of a mentally defective person should he be released into the community.[128]

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[121] S.A. 1933, c. 29, s. 2(b).

[122] Id.

[123] S.A. 1937, c. 46, s. 2.

[124] R.S.A. 1942, c. 191; R.S.A. 1955, c. 199.

By 1964 a shift in thinking about the mode of delivery of mental health services had occurred, influenced in large part by a report of the Third Expert Committee on Mental

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[125] S.A. 1929, c. 34, s. 4; S.A. 1931, c. 62, s. 3; S.A. 1952, c. 53, s. 2(a).

[126] S.A. 1907, c. 7, s. 24; R.S.A. 1922, c. 223, s. 23 (as am. S.A. 1924, c. 25, s. 24); R.S.A. 1942, c. 192, s. 29 (as am. S.A. 1956, c. 29, s. 3); R.S.A. 1955, c. 200, s. 34 (as am. S.A. 1956, c. 29, s. 7).

[127] R.S.A. 1922, c. 223, ss. 21, 22 (as am. 1924, c. 25, ss. 21, 22); R.S.A. 1942, c. 192, ss. 24, 26(1); R.S.A. 1955, c. 200, ss. 29(1), 31(1).

[128] S.A. 1933, c. 29, s. 2(b); R.S.A. 1942, c. 191, s. 14(3); R.S.A. 1955, c. 199, s. 14(4).

Health of the World Health Organisation:[129]

> The 'classical' system, they stated, was one in which the mental hospital dominated the service, operating virtually a closed system, and controlling any services in the surrounding community. This was contrasted with the 'modern' system, in which a variety of services--in-patient, out-patient, day care, domiciliary care, hostels and so on--operated as 'tools' in the hands of the community, and the hospital became only one tool at the disposal of the medico-social team.[130]

This shift is reflected to some extent in the Mental Health Act passed in 1964.[131] Legislative evidence suggests, however, that the trend toward community-centered care had begun much earlier with the introduction, in 1929, of certificates of approval of private homes for the reception of mentally diseased persons,[132] and provision for the committal of a mental defective to a person in a private dwelling-house.[133] The trend was continued by the establishment, commencing in 1931, of psychopathic wards for intensive treatment on a short-term basis in community hospitals[134] (in 1953 they became psychiatric wards);[135] and by the provision in 1959 for the establishment of disturbed children's wards in community hospitals.[136] The accuracy of this observation is born out by the following statement contained in a study published by the Canadian Royal Commission on Health Services (set up under the chairmanship of Mr. Justice Emmett M. Hall in 1961): "In the 1930's, public mental hospitals provided the bulk of in-patient care. In subsequent years other types of facility were developed and extended."[137]

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[129] WHO Technical Report Series No. 73 (1953).

[130] JONES, MENTAL HEALTH SERVICES, supra note 39, at 293.

[131] S.A. 1964, c. 54.

[132] S.A. 1929, c. 34, s. 5, provision for which remained in effect until 1972. R.S.A. 1970, c. 231, s. 32(1).

[133] S.A. 1929, c. 19, s. 2.

[134] S.A. 1931, c. 62, s. 4.

[135] S.A. 1953, c. 73, ss. 2-4.

Along with the articulation of a community-centered approach to mental health care, the medical profession advocated the implementation of less formal admission and discharge procedures. Judicial intervention prior to admission was criticized for its adverse effect on medical therapy. The Legislature of Alberta was persuaded to leave hospital admission--even in the face of protests by the person about to be admitted--to medical decision. Time limits were placed on the length of detention under various medical certificates, with opportunity for medical renewal of the detention. And a review panel was instituted to investigate complaints as to detention. It could aptly be said of the 1964 legislation, at which we shall look more closely below, that

> [t]he objects of the Act were to bring the law into line with modern psychiatric thought and practice, and to change the whole atmosphere of that law from one concerned mainly

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[136] S.A. 1959, c. 51, s. 4.

[137] A. RICHMAN, PSYCHIATRIC CARE IN CANADA: EXTENT AND RESULTS 49 (1966).

> with custodial care, largely long term in hospital, to one of positive, active and rapid treatment, as far as practicable within the community and, where this is not possible, leading to an early return of the patient to the community.[138]

The effect of the development in 1952 of the chlorpromazine groups of drugs (tranquillizers) on mental health care should be noted in passing. These drugs alleviated "the more disturbing symptoms of mental illness, while leaving the patient accessible to other forms of therapy."[139] In many instances, they eliminated the need for continued hospitalization once a patient's condition was stabilized. They also helped open up avenues of 'alternative care'.[140]

We turn now to the Mental Health Act of 1964--the product of two years' work by a "special committee of twelve, appointed by the Government of Alberta."[141] This Act, which came into force on 1 January 1965, brought all persons suffering from mental disorder under the same legislation.[142] "Mentally disordered person" was defined to mean "a person who is suffering from mental illness, mental retardation or any other disorder or disability of the mind."[143]

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[138] C. FRENCH, NOTES ON THE MENTAL HEALTH ACT 1959, 9 (2d ed. 1971), speaking of the Act introduced for England.

[139] JONES, MENTAL HEALTH SERVICES, supra note 39, at 291-92.

[140] Id. at 292.

[141] Angus, The Mental Health Act of Alberta, 16 U.T.L.J. 423 (1965-66) [hereinafter cited as ANGUS].

[142] Both the Mental Diseases Act and the Mental Defectives Act were repealed. S.A. 1964, c. 54, s. 39 [hereinafter cited as ACT 1964].

Ironically, exclusion of the judiciary from the admission procedure led to more legislative regulation of admissions than had been required before. The Act provided first of all for the hospitalization, without any certificates, of a person who was or was "believed to be a mentally disordered person in need of the care and treatment or observation provided in a hospital" and who was "not unwilling to be admitted."[144] The precedent for voluntary submission to treatment begun in 1924 by amendment to the Mental Diseases Act[145] was thereby continued. In 1964 the patient acquired the right to leave the hospital 72 hours after giving written notice to the superintendent of his desire to be discharged,[146] but notwithstanding the giving of notice, the patient could be detained for 30 days with the approval of the superintendent on the issue of one certificate by the responsible physician or a physician designated by the superintendent to personally examine the patient.[147]

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[143] Id. s. 2(c). At first glance, this may seem to be a forward step. No attempt had been made in previous legislation to define "insane person" or "mentally diseased person" (although "mentally defective person" had been defined). However, a closer look reveals that the definition contains facsimiles of the earlier terms but fails to give much further assistance as to their meaning.

[144] Id. s. 5(1).

[145] S.A. 1924, c. 25, s. 5.

[146] ACT 1964, supra note 142, s. 5(3).

Two certificates were ordinarily required to admit and detain for 30 days a person who was not already in the hospital.[148] These certificates set forth the opinions of two physicians formed after separate examinations that a person was mentally disordered and "in need of care, supervision and control (a) for his own protection or welfare, or (b) for the protection of others."[149] The admission had to take place within 14 days from the date of the examinations or, if they were not made on the same date, within 21 days from the date of the first examination.[150] Where it appeared to be "impossible to obtain the certificates of two physicians within a reasonable time," a person could be admitted and detained for 72 hours on the strength of the certificate of one physician "stating the urgent nature of the case."[151] The detention could be extended for 30 days by the issue of a renewal certificate.[152]

Short of hospitalization, a justice of the peace could issue his warrant directing the medical examination of a person who refused to submit to one where an informant believed him to be mentally disordered and "in need of care, supervision and control, (a) for his own protection or welfare, or (b) for the protection of others."[153] Before issuing the warrant, the justice was to satisfy himself "as to the responsibility and integrity of the informant."[154] Similarly, upon finding in a place to which the public had access someone who appeared to be a mentally disordered person in immediate need of care, supervision and control, a police officer was empowered without a warrant to take that person for a medical examination.[155] In both cases, the certificate of the examining physician authorized hospitalization for 72 hours,[156] subject to the issue of a certificate of renewal for 30 days.[157]

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[147] Id. s. 5(4).

[148] Id. s. 6(1),(2),(8).

[149] Id. s. 6(4).

[150] Id. s. 6(7).

[151] Id. s. 7(1).

[152] Id. s. 7(3).

Any 30-day detention could be extended for successive periods of six months each with the approval of the superintendent upon the issue of a certificate of renewal by the responsible physician, or one designated by the superintendent, stating his opinion that the patient was so mentally disordered as to require "care, supervision and control

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[153] Id. s. 8(1).

[154] Id.

[155] Id. s. 8(3).

[156] Id. s. 8(4).

[157] Id. s. 8(5).

(a) for his own protection or welfare, or (b) for the protection of others."[158]

Emergencies aside, "no diagnostic or treatment services or procedures" were to be carried out on a voluntary patient "except with his consent or that of his nearest relative."[159] On the other hand, the superintendent had "full authority to determine the care and treatment" to be provided to an involuntary patient and "to direct the giving of that care and treatment."[160]

The superintendent was under a duty to discharge a patient when, in his opinion, the patient was "sufficiently recovered" or it was "in the interest of the patient that he be discharged."[161] Furthermore, he was not to detain against his wishes a patient who no longer required "care, supervision or control in a hospital" if that patient's nearest relative undertook to keep him under supervision.[162] The superintendent also had authority to permit the temporary discharge of a patient to the supervision of his family or friends if he considered it "conducive to the recovery of, or otherwise in the interest of" the patient.[163] Six-month renewal certificates could be issued in respect of a patient discharged under supervision.[164] If he again became "in need of care in a hospital," the patient could be recalled by warrant of the superintendent or of the Director of Mental Health at any time before the expiry of the period of authorized detention.[165]

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[158] Id. s. 12(1),(2).

[159] Id. s. 13(1).

[160] Id. s. 13(2).

[161] Id. s. 22(1).

[162] Id. s. 23(1).

[163] Id. s. 24(1)); Alta. Reg. 675/64, s. 12(1),(2).

In 1966, all 30-day periods of detention were increased to 60 days.[166] Another amendment provided that a person taken to a hospital for a medical examination, either on the warrant of a justice of the peace or by a police officer, could not be detained for more than 72 hours unless within that time a 60-day renewal certificate was issued; a person taken to a place of safety other than a hospital was to be examined forthwith, and the certificate of the examining physician gave authority for 72-hour hospitalization subject to the issue of a renewal certificate.[167] A further amendment empowered the Minister of Health to authorize the superintendent to proceed with diagnosis and treatment of a voluntary patient who was unable to give his own consent where no nearest relative could be found.[168]

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[164] ACT 1964, supra note 142, s. 24(2).

[165] Id. s. 24(3); Alta. Reg. 675/64, s. 12(3).

[166] S.A. 1966, c. 54, ss. 3, 4, 5, 6, 8, 9(a)(ii).

[167] Id. s. 6.

[168] Id. s. 10(a).

It was made clear in 1968 that a person was not to be "dealt with . . . as a mentally disordered person because of promiscuity or other immoral conduct,"[169] and that hospitalization on the certificate of one examining physician had to occur within 72 hours of the issue of the certificate.[170] By amendment in 1970, it became possible to issue a 60-day certificate in respect of a voluntary patient whether or not he had given notice of his desire to be discharged.[171] In the case of admission on the certificates of two physicians, the written approval of the superintendent was added as a condition precedent to conveyance of the person named in the certificates to that hospital.[172] In the case of one certificate, the physician was permitted to endorse the details of an oral or written approval on the certificate which then constituted sufficient authority for conveyance.[173]

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[169] S.A. 1968, c. 62, s. 3. The distinction between mental disorder and sexual promiscuity has long challenged determinations of the need for detention. Middleton, J.A. wrestled with the issue in the Ontario case of Re Bowyer (1930), 66 O.L.R. 378, 383-84, where he held as follows:

> Counsel for the applicant argued the case upon the footing that the girl is hopelessly immoral. Mere immorality is not insanity and does not justify detention in an asylum. I agree with the latter statement, but here I find the immorality is merely a symptom of the insanity which, in my view, undoubtedly exists. A woman who, in the language of one of the reports, is very much oversexed, and has only the mentality and will-power of a child of tender years to control her appetites and passions, is insane, and not only insane but also a danger to herself and to the community. That she is physically well-developed and of pleasing appearance, and when not in a psychosis can make herself attractive, only adds to the danger. The provisions of the law relating to the confinement of insane persons are by no means limited to the case of maniacs who will slay others and injure themselves, but apply as well to those unfortunates who for their own sake as well as in the interest of the community are dangerous to be at large. The argument here presented, that this girl is her own master and her body is her own to use and to abuse as she sees fit, belongs to another and past age. The community as a whole is concerned. For 6 years this woman has been a charge upon the public funds, her child is a ward of the Children's Aid Society, and liberty to resume her reckless life will mean further disaster.

It is questionable whether his reasoning would receive judicial reinforcement were the issue to come before a court today when there is no doubt that use of the sanction of detention in the name of mental disorder for the purpose of enforcing moral standards is most improper.

A patient who left a hospital without having been discharged could be returned to the hospital at any time within 60 days on the order of the superintendent.[174] After 60 days' absence the patient was deemed to be discharged.[175]

The Mental Health Act was reenacted without change in the 1970 revision.[176]

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[170] S.A. 1968, c. 62, s. 4(a).

[171] S.A. 1970, c. 75, s. 3.

[172] _Id_. s. 4.

[173] _Id_. ss. 5, 6.

[174] _Id_. s. 29(1).

[175] _Id_. s. 29(2).

[176] R.S.A. 1970, c. 231.

The absence of judicial safeguards of the personal liberty of the subject prior to his involuntary hospitalization is self-evident. Even where a justice of the peace was called upon to issue his warrant for a medical examination, his jurisdiction did not extend to the merits of detention for this purpose; his only task was to satisfy himself as to "the responsibility and integrity of the informant."[177] It fell to a "review panel" (the Minister of Health was to appoint one for each hospital)[178] to investigate complaints alleging that a certificate or a renewal certificate should be revoked.[179]

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[177] Id. s. 8(1). Under the 1972 Act, the function of the provincial judge who has a comparable role is slightly more demanding: he must be satisfied of the need for examination and that it "can be arranged in no other way." ACT 1972, supra ch. I note 1, s. 33(1).

[178] ACT 1964, supra note 142, s. 15(1).

[179] Id. ss. 15(8), 17(1). The 1964 legislation, which introduced the "review panel" to Alberta, was copied "almost word for word" from the Mental Health Act passed in Saskatchewan in 1961 (S.S. 1961, c. 68). ANGUS, supra note 141, at 423. The provisions of both Acts are suspiciously similar to those enacted in England by the Mental Health Act, 1959 (7 & 8 Eliz. II. c. 72), from which precedent the conceptualization was most assuredly borrowed. The English Act was the outcome of the recommendations contained in the PERCY COMMISSION REPORT, cited supra ch. II note 10.

While it is true that as early as 1940 British Columbia established a procedure for review of detention by a panel of two medical practitioners, not being members of the staff of a mental hospital (S.B.C. 1940, c. 27, s. 20), the procedure can hardly be regarded as a substitute for judicial scrutiny, whereas the review panels constituted in accordance with the English model replace the judiciary at first instance.

The institution of the "review panel" continues today, and for convenience we defer examination of it to our discussion, in the next section, of the present provisions governing its composition and operation. Where these are at variance with the 1964 provisions, the differences will be footnoted. (An extensive comparison of review panels under the two Acts is charted in Appendix 2.)

One miscellaneous point: from 1907 until 1972, the Insanity, Mental Diseases, and Mental Health Acts protected persons acting under them "in good faith and with reasonable care" from liability to any civil proceedings, and a judge of the Supreme Court had power on application to stay any such proceedings on whatever terms he thought fit.[180] In 1968, this protection was extended to review panel members.[181] However, the protective provisions were dropped altogether in 1972.[182]

Although the theory of voluntary treatment in a community-based health care delivery system was being promulgated in 1964, such a system remained far from a reality in Alberta. The publication of the findings of the _Alberta Mental Health Study, 1968_ brought this fact very much into public light.[183] The study, commissioned by the Government and directed by Dr. W. R. N. Blair, Head of the Department of Psychology of the University of Calgary, was concerned with a "total mental health system."[184] In his Report, Dr. Blair proposed the adoption of a delivery system which would involve maximum use of psychiatric units in general hospitals as the primary hospital facility:[185]

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[180] S.A. 1907, c. 7, ss. 25, 26; R.S.A. 1922, c. 223, ss. 24, 25; R.S.A. 1942, c. 192, ss. 30, 31; R.S.A. 1955, c. 200, ss. 35, 36; ACT 1964, *supra* note 142, s. R.S.A. 1970, c. 231, s. 35. The Mental Defectives Acts had no counterpart.

[181] S.A. 1968, c. 62, s. 12(b).

[182] It is probable that nevertheless the courts will apply similar criteria for exoneration from liability for acts performed under the Mental Health Act, 1972. *See* Draper, in 3 BARKER PROJECT, *supra* ch. II note 8, at 23-26.

Furthermore, their deletion has little significance for members of the review panel who enjoy the superior protection of judicial privileges and immunities afforded to them as commissioners of inquiry. *See* note 237, s. 4 *infra*.

> Admission practices in mental hospitals should be changed to ensure that all illness which can be treated within a general hospital will receive attention there and not be allowed to become a responsibility of a mental hospital.[186]

He was critical of the absence of an integrated organizational and administrative structure for mental and physical health services at the local, regional and provincial levels and for the coordination of related community facilities, as well as of the shortage of facilities for confused old people and for emotionally-disturbed children and adolescents, and urged the rectification of these problems.

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[183] BLAIR REPORT, _supra_ ch. I note 6.

[184] _Id._ at i.

[185] _Id._ at 317. Dr. Blair states in the _Preface_ to the Report that the recommendations have the "unanimous endorsation" of the eleven Study Group Chairmen and the three other regular participants in the public hearings held in conjunction with the study. _Id._ at ii.

[186] _Id._ at 321.

The Legislature responded in 1972 with the existing Act[187] which develops to a greater extent the approach to mental health care introduced in 1964. Significantly, the Act no longer covers voluntary admissions, provision for which presumably was dropped in an effort further "'to remove, insofar as it is possible to do so, the distinction between physical illness and mental illness . . .,' particularly in the manner of admission, detention, and discharge from public institutions."[188]

We outline the existing legislation in the next section of this Chapter.

B. Present

1. Admission and Discharge

The detention, in a "facility," of a person suffering from mental disorder is the subject matter of the Mental Health Act, 1972.[189] "Facility" is defined to mean "a place or part of a place designated by the regulations as a facility."[190] Two facilities have been designated for all purposes: The Alberta Hospital, Edmonton, and The Alberta Hospital, Ponoka.[191]

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[187] ACT 1972, _supra_ ch. I note 1.

[188] Strayer, _New Mental Health Act in Saskatchewan_, 15 U.T.L.J. 219 (1963), _quoting in part_ the statement of the Minister of Public Health reported in 35 DEBATES AND PROCEEDINGS 9 (1961) upon the introduction of that Act.

[189] ACT 1972, _supra_ ch. I note 1, assented to November 22, 1972.

Admission certificate. The Mental Health Act, 1972 embraces only those persons, called "formal patients,"[192] who are detained against their will.[193] Formal admission occurs where, after separate examinations by each of them, either a therapist[194] and a physician or two physicians issue admission certificates in respect of a person.[195] The conditions precedent to the issue of a certificate are threefold: the examiner must be "of the opinion that a person is

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[190] *Id.* s. 1(g) *as am.* S.A. 1973, c. 76, s. 2. Prior to 1973, it was to be a facility "for the observation, examination, care, treatment, control and detention of persons suffering from mental disorder." The amendment struck these words from the statute, but they were written into the regulations under it. Alta. Reg. 163/73, s. 2.

[191] Alta. Reg. 163/73, s. 2, *striking out* Alta. Reg. 119/73, s. 2. As is permitted by s. 60(3), *added by* S.A. 1973, c. 76, s. 14(c), this regulation provides for and designates a second class of facility for purposes of the issue of a "conveyance and examination certificate" under s. 26.

[192] The use of just such expressions as "formal patient" allows Alan Stone to tag on to his description of public mental health care as "the paradigm of failure of social progress in the democratic state" the words, "each generation's euphemism becoming the next generation's epithet." Stone, *Mental Health and the Law*, HARV. L. SCH. BULL., Winter 1976, 28.

[193] Voluntary admissions are contemplated, nevertheless, as is evidenced by the use of the expression "voluntary patient." ACT 1972, *supra* ch. I note 1, s. 31(3), These take place in accordance with the policies and procedures adopted by the board which, where a facility is not an approved hospital under the Alberta Hospitals Act, is defined to be the person in charge of the facility. *Id.* s. 1(b)(ii).

[194] A "therapist" is a mental health worker registered as such by a board created for this purpose. *Id.* ss. 6-17.

(c) suffering from mental disorder,
(d) in a condition presenting a danger to himself or others, and
(e) unsuitable for admission to a facility other than as a formal patient.[196]

Where he is of this opinion, the legislation directs that he "shall issue" the certificate. The examination may be conducted at a place other than the facility intended for admission provided that at least one of the issuing examiners is on the staff of that facility.[197]

Two certificates give "sufficient authority to observe, examine, care for, treat, control and detain" the person in the facility for one month from the date of the second certificate.[198]

Upon admission, the board[199] "is under a duty to provide such diagnostic and treatment services as the patient is in need of and that the staff of the facility are capable and able to provide,"[200] and shall determine, provide, and review within every six months the level of security that is "reasonably required for each patient in view of all the circumstances."[201]

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[195] Id. s. 29(1).

[196] Id. The difficulties with the definition of "mental disorder" and with the prediction of dangerousness were discussed in Chapter II (see pp. 15-19 supra); nor does the Act give any assistance as to the determination of suitability for admission other than as a formal patient.

[197] Id. s. 29(1.1), added by S.A. 1973, c. 76, s. 5.

[198] Id. s. 30(1). There is no restriction as to the time after examination within which an admission certificate must be issued. Compare this with a "conveyance and examination certificate" which may not be issued later than 72 hours after the examination. Id. s. 25.

[199] Defined supra note 193.

Conveyance and examination certificate. Prior to formal admission, the certificate of one physician or therapist may authorize the conveyance of a person to a facility for examination.[202] A "conveyance and examination certificate," as it is called, is based on the opinion of the issuing examiner that the person is "suffering from mental disorder" and "in a condition presenting a danger to himself or others." The examiner is not compelled to issue the certificate, but, if he does, he must issue it within 72 hours of examination.[203] A further 72 hours is allowed for conveyance to a facility, followed by 24 hours for observation and examination after arrival,[204] and treatment may be prescribed and provided during both periods.[205] One admission certificate provides the same authority as a conveyance and examination certificate.[206]

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[200] ACT 1972, supra ch. I note 1, s. 24(1). Yake is critical of the retreat in the last clause from responsibility to provide adequate treatment. 2 BARKER PROJECT, supra ch. II note 8, at 4-5.

[201] ACT 1972, supra ch. I note 1, s. 24(2).

[202] The Foothills Provincial General Hospital, Calgary, the Holy Cross Hospital, Calgary, and the Calgary General Hospital are "facilities" for this purpose. Alta. Reg. 163/73, s. 2(3).

[203] ACT 1972, supra ch. I note 1, s. 25. The language of the section is "may" issue.

Apprehension for examination. A person who is believed to be "suffering from mental disorder," "in a condition presenting a danger to himself or others," and who "refuses to be examined by a therapist or a physician" may be apprehended for examination pursuant to the order of a provincial judge in proceedings instigated by the information of any person upon oath.[207] Moreover, a peace officer who observes an apparently mentally disordered and dangerous person "acting in a manner that in a normal person would be disorderly" may convey him directly to a facility if the situation is an emergency.[208] In both cases, the apprehension

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[204] Id. s. 26(1),(2) as am. S.A. 1973, c. 76, s. 4.

[205] Id.

[206] Id. s. 30(2) as am. S.A. 1975(2), c. 65, s. 3.

[207] Id. s. 33(1).

[208] Id. s. 34(1). The precise wording of the section is:

> Where a peace officer observes a person
>
> (a) apparently suffering from mental disorder,
> (b) in a condition presenting a danger to himself or others, and
> (c) acting in a manner that in a normal person would be disorderly,
>
> the peace officer may, if he is satisfied that

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gives rise to the same authority as a conveyance and examination certificate.[209]

Renewal certificate. The provisions for renewal of the period of detention of a formal patient parallel those for admission, apart from the substitution of "may extend" for

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> (d) the person should be examined in the interests of his own safety or the safety of others, and
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> (e) the circumstances are such that to proceed under section 33 would be dangerous,

convey the person to a facility for an examination.

The McRuer Commission criticized a similarly worded section in the Ontario Mental Health Act, 1967, for permitting the police officer to exercise his power on the basis of the subjective condition precedent, "if he is satisfied." It submitted that the condition should be an objective one such as, "if he has reasonable grounds to believe," or "if he believes on reasonable grounds," adding: "We can see no reason why such broad power to interfere with the liberty of the subject should be conferred in the terms expressed in this section." 3 ONTARIO ROYAL COMMISSION INQUIRY INTO CIVIL RIGHTS, REPORT NO. 1, 1233 (1968) [hereinafter cited as McRUER COMMISSION REPORT].

It is clear from the Supreme Court of Canada decision in the Saskatchewan case of Beatty and Mackie v. Kozak, [1958] S.C.R. 177, that the section contemplates an emergency situation, and that the conditions set out in clauses (a), (b) and (c) must be concurrently met before the peace officer's discretion to act arises.

A physician who conducts an examination of a person who is brought to him for this purpose by a member of the R.C.M.P. does not perform his duties as "an officer or servant of the Crown" so as to confer jurisdiction upon the Federal Court to hear allegations of negligence against him. Neustaedter v. The Queen (1975), 60 D.L.R. (3d) 575, 576, where the Federal Court held that the doctor had performed the examination under the Mental Health Act, R.S.M., 1970, c. M110, s. 9, "in the course of the practice of his profession as a physician."

[209] ACT 1972, supra ch. I note 1, ss. 33(3), 34(2).

"shall issue."[210] The first pair of renewal certificates extends the detention for "not more than two additional months," and each subsequent pair, for "not more than six additional months."[211]

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[210] Id. s. 31(1),(1.1) as am. S.A. 1973, c. 76, s. 7(a). The discrepancy between the use of "may" and "shall" in the sections dealing with admission, conveyance and examination, and renewal certificates is probably unintentional, although a passage in the Manitoba judgment of Burke v. Efstathianos (1961), 34 W.W.R. 337, 345 (Man. C.A., per Schultz, J.A.), suggests that the opposite inference should be drawn from such a change of language:

> It is to be noted that in sec. 6 the reference is to Selkirk and Brandon hospitals and the words used in regard to admission of patients are "shall be admitted " that in sec. 7, where the reference is to the psychopathic hospital, the words used are "may be admitted." Where, as here, the legislature uses different language in two sections dealing with the same subject-matter, it is reasonable to infer that where there is a change of language there is a change of intention. This is all the more significant in the present instance where the change is from the imperative to the permissive.

Whichever is the case, this variation in usage raises an issue which, to the writer's mind, should be resolved one way or the other. If the social interests truly override the individual interest where the named conditions obtain, then the word should be "shall" in every case. However, since "dangerousness" is a variable criterion, the writer favours the flexibility of choice offered by "may;" it would permit the examiner to exercise his discretion by weighing the potential risk, both individual and social, of non-certification against the likely benefit to the individual of detention. For a differing opinion, see Waddams, Are the Mentally Ill Deprived of Rights?, 20 CHITTY'S L.J. 301 (1972) [hereinafter cited as WADDAMS], whc says "it is not the job of a medical man to prescribe for the safety of society." (The role of the review panel in respect of the application of these criteria is discussed in Chapter V. See pp. 168-75 infra.

[211] ACT 1972, supra ch. I note 1, s. 31(2) as am. S.A. 1973, c. 76, s. 7(b).

Form of certificates. Each of the three forms of certificate--admission, conveyance and examination, and renewal--must show "the name of the [examiner] issuing it," "the date that the personal examination was conducted," the facts upon which the examiner formed his opinion as to the existence of mental disorder and the condition of dangerousness "distinguishing the facts observed by him from the facts communicated to him by others," and "the date of issue."[212] An admission certificate and a conveyance and examination certificate shall show the time of examination and issue in addition to the date.[213] All certificates are protected from invalidity for "irregularity, informality or insufficiency."[214]

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[212] Id. ss. 27, 29(2),(3), 32(1),(2). There is no mention of the facts upon which the examiner formed opinion as to unsuitability for detention other than as a formal patient in the case of admission and renewal certificates.

[213] Id. ss. 27, 29(2),(3).

[214] Id. s. 57. In practice, a low standard of completion is adhered to:

> The information contained in the conveyance and examination and admission certificates accompanying patients to the Alberta Hospitals is very scanty. The admission certificate . . . contains a small amount of space for the examining physician to justify his certification under the headings: "facts observed by me" and "facts communicated to me by others." In a sample of completed admission forms made available to us by the Alberta Hospitals (with names blanked out) we found a significant number in which no reasons or facts were given but the headings merely checked. The vast majority of the others are very poorly completed.

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Expiration of certificates. When the authorized period of detention expires, a formal patient becomes "a voluntary patient not subject to detention" and he is to be so informed.[215] As well, a formal patient may, at any time, "be continued as a voluntary patient in accordance with the by-laws of the board" in which event the certificates authorizing the detention are "deemed to be cancelled."[216]

Discharge. Whether or not he is still suffering from mental disorder, a formal patient who is no longer a danger to himself or others may be discharged by the board,[217] with notice "where" possible" to the referring source

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Draper, in 3 BARKER PROJECT, supra ch. II note 8, at 37-38. Although such practices may suffice to protect the issuing examiners from civil liability, they hardly reflect the spirit of the Act--especially in view of the seriousness of the consequences of certification for the individual affected. As Meredith, J.A. of the Ontario Court of Appeal stated in Re Gibson (1908), 15 O.L.R. 245, 248:

> The effect of the incarceration of a person in a lunatic asylum . . . is of so far reaching a character, as to both person and property, that every care should be taken that all the requirements of the law authorizing it are duly observed by everyone bringing it about or concerned in it.

[215] ACT 1972, supra ch. I note 1, s. 31(3).

[216] Id. s. 31(4).

[217] Id. s. 48(3). Note that the directive is "may" and not "shall." Nor does the Act make any mention of cancellation of the certificates of a formal patient who, whatever his state of "dangerousness", is no longer suffering from mental disorder, or who has become "suitable" for voluntary care. Surely, there should be no question as to the board's

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and, if he agrees, to his nearest relative.[218] Should he refuse to leave the hospital, the board may insist upon his removal by the person liable for the payment of expenses incurred in connection with his hospitalization, or by the Minister of Social Services and Community Health.[219]

Absence from facility. Leave of absence may be granted upon the terms and conditions prescribed by the medical director[220] without affecting the authorized period of detention.[221] It is subject to revocation and recall

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obligation to release and the patient's right to be released as soon as any one of the conditions upon which detention is premised ceases to exist. We may take guidance from the words of Meredith, C.J.C.P., speaking in the context of an application to supersede an order of lunacy appointing a committee of the person and estate (Re Annett (1913), 25 O.W.R. 311, 312):

> No one who is sane should be compelled to live, or to die, under the ban of an order declaring him to be insane; there should be no undue delay in "superseding, vacating and setting aside the order declaring the lunacy;" though, of course, care must be taken that one who has been insane is really sane again--that it is a real case of recovery.

Adapted to suit the context of the Mental Health Act, 1972, the latter portion of the sentence might be rephrased as follows: "though, of course, care must be taken that the conditions of detention no longer obtain."

See also note 210 supra and pp. 168-75 infra.

[218] ACT 1972, supra ch. I note 1, s. 47(1).

[219] Id. s. 47(2) as am. S.A. 1973, c. 76, s. 12, S.A. 1975(2), c. 12, s. 8.

[220] Id. s. 51(1),(2) as am. S.A. 1975(2), c. 65, s. 8.

[221] Id. s. 56(3) as am. S.A. 1975(2), c. 65, s. 9(b).

should the patient's condition present "a renewed danger to himself or others,"[222] and the director may enlist the assistance of any peace officer to effect this return,[223] or the return of a patient who has left without leave.[224]

2. Review of Detention

It is clear that the initial responsibility for weighing individual and social interests rests with the medical profession and to a lesser extent those mental health care workers designated as therapists. Judicial consideration is relegated to subsequent review of the medical decision to detain.[225]

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[222] Id. s. 51(3) as am. S.A. 1975(2), c. 65, s. 8. A parallel suggests itself here between the power of the medical director in respect of leave and that of the federal Parole Board in respect of parole. (See discussion of Mitchell v. The Queen in Chapter V, pp. 137-39 infra.) However, there are two important differences: (1) whereas the Parole Board has been held to possess a totally unfettered discretion as to both the granting and suspending of parole, the medical director's discretion to revoke a leave of absence is controlled by the objective standard of "renewed danger;" and (2) whereas the suspension of parole results in the forfeiture of that part of the sentence served during parole, the authorized period of detention under the Mental Health Act, 1972 expires on a date firm whether or not some of the time was spent on leave since revoked.

[223] Id. s. 51(4).

[224] Id. s. 56(1).

[225] We noted at pp. 81-82 supra that the review panel made its first appearance in Alberta under the Mental Health Act of 1964 and that Appendix 2 contains a detailed comparison of the review panel provisions of the 1964 and 1972 Acts. In the footnotes which follow, we highlight the significant differences between the former and present provisions.

Purpose of review panel. The "review panel," as the administrative tribunal created to supply the judicial ingredient is called, exists for the purpose of hearing and considering "applications from formal patients concerning the cancellation of admission certificates or renewal certificates."[226] After conducting whatever investigation and hearing it considers necessary,[227] the panel may cancel or refuse to cancel the certificates.[228] The option of cancellation, with or without conditions, arises where the panel "considers that the applicant is not in a condition presenting a danger to himself or others," but cancellation even in these circumstances is not mandatory if a prima facie meaning is accorded to the words of the section.[229]

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[226] ACT 1972, supra ch. I note 1, s. 19(1). The application is limited to "formal patients," meaning that the review procedure is available only in respect of patients under detention for a period of at least one month.

The review panel has two additional functions which fall outside the scope of this thesis: (1) to hear applications for cancellation of certificates as to the incapacity of a person to manage his estate (id. ss. 36, 38, 43), and (2) in the case of a person convicted of a criminal offence and sent to a facility for treatment, to hear an application for an order transferring him back to a correctional institution (id. s. 42).

[227] Id. s. 39(2).

[228] Id. s. 41(2).

[229] Id. It is noteworthy that there is just one criterion for cancellation, whereas the admission and renewal certificates are founded on the simultaneous existence of three conditions: mental disorder, dangerousness to self or others, and unsuitability for admission to or continuation at a facility other than as a formal patient (id. ss. 29(1), [Continued on next page.]

Establishment. The Minister of Social Services and Community Health has the obligation to establish one or more review panels,[230] each comprised of a psychiatrist, a therapist or a physician, a solicitor and "a person representative of the general public."[231] The solicitor is

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31(1)). Query: what should be the result if the review panel finds that the applicant is not suffering from mental disorder, or is suitable for admission or continuation as a voluntary patient? We consider this point in Chapter V. See pp. 168-72 infra. (The jurisdiction of the review panel was not spelled out in the 1964 Act.)

[230] Id. s. 19(1). In 1964, the Minister of Health was to appoint a review panel for each hospital. ACT 1964, supra note 142, s. 15(1). In fact, this is what the Minister has done under the 1972 Act.

Both Acts employ the word "shall." The McRuer Commission criticized the Legislature of Ontario for couching a comparable subsection in the Mental Health Act, 1967 in permissive language. McRUER COMMISSION REPORT, supra note 208, at 1234-35.

[231] ACT 1972, supra ch. I note 1, s. 19(2). The 1964 Act provided for a three- instead of a four-member panel, to consist of a physician, a solicitor and one other person. ACT 1964, supra note 142, s. 15(2). The qualifications of the third member who held the balance of power between the representatives of medical and legal interests were left to the discretion of the Minister. In England, where the Mental Health Review Tribunals still consist of three members, the Rules laid down in 1960 give some assistance. They specify that the lay member shall have "such experience in administration, such knowledge of the social services or such other qualifications or experience as the Lord Chancellor considers suitable." Wood, Mental Health Review Tribunals, 10 MED. SCI. & L. 86, 88 (1970) [hereinafter cited as WOOD]. According to Professor Wood's analysis, the third member is there to represent social, as compared with legal and medical, interests. In Alberta, the problem has been resolved by the addition of a fourth member, a psychiatrist, making it clear that the Legislature regards the medical contribution to the decision very highly. That is to say, the social interest in the health of each member of the community is now represented by 50% of the panel membership.

chairman,[232] and he holds the tie-breaking vote.[233] Other sections cover the appointment of alternate members;[234] periodical review of appointments;[235] the exclusion of persons falling within defined categories from eligibility to sit in circumstances where their presence on the panel could suggest bias;[236] the granting of "the powers of a commissioner appointed under The Public Inquiries Act" to all members for the purpose of hearing and considering applications;[237] and the provision of "secretarial, legal,

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[232] ACT 1972, supra ch. I note 1, s. 19(2)(c). Under the 1964 Act, the Minister was permitted to designate the chairman. ACT 1964, supra note 142, s. 15(3). It was his practice to name the physician, and not the solicitor, to this post.

[233] ACT 1972, supra ch. I note 1, s. 20(2).

[234] Id. s. 19(3).

[235] Id. s. 20(4).

[236] Id. s. 21(2).

[237] Id. s. 22(1). The powers under the Public Inquiries Act, R.S.A. 1970, c. 296, of significance for our purposes are contained in sections 3 and 4:

> 3. The commissioner or commissioners shall have the power of summoning before him or them any persons as witnesses and of requiring them to give evidence on oath, orally or in writing, or solemn affirmation if they are persons entitled to affirm in civil matters, and to produce such documents and things as the commissioner or commissioners deem requisite to the full investigation of the matters into which he or they are appointed to inquire.
>
> 4. The commissioner or commissioners shall have the same power to enforce the attendance of persons as witnesses and to compel them to give

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consultative and other assistance."[238]

Objection to detention. Upon the issuance of the admission or renewal certificates authorizing his detention, the formal patient and his nearest relative are to be informed, "in simple language," of the reason for the detention.[239] They are also to be given a written statement, in their own language where necessary, of the patient's right to apply for cancellation of the certificates, which statement shall include the authority for and length of his detention, the function of the review panels, and the name and address of the chairman of the appropriate review panel.[240] The board is further obligated to do "such other things as [it] considers expedient" to facilitate the submission of applications.[241]

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> evidence and to produce documents and things as is vested in a court of record in civil cases, and the same privileges and immunities as a judge of the Supreme Court of Alberta.

[238] ACT 1972, supra ch. I note 1, s. 22(2).

[239] Id. s. 36(1)(a),(b),(c). A form for the notification of the patient and his nearest relative of the existence and function of the review panel was prescribed by the regulations under the 1964 Act: Alta. Reg. 675/64, s. 22, Form VI as am. Alta. Regs. 14/68, s. 3(e) and 197/68, s. 2(a). There is none now.

The board is also under an express duty, new since 1964, to provide an interpreter in the event of language difficulty. ACT 1972, supra ch. I note 1, s. 36(3); Alta. Reg. 119/73, s. 5.

[240] ACT 1972, supra ch. I note 1, s. 36(1)(d).

[241] Id. s. 36(4); Alta. Reg. 119/73, s. 4.

Application for review. A formal patient or a person on his behalf may make one application with respect to each two admission or renewal certificates;[242] moreover, as an added protection of the patient's interest, the Minister, the Director or a board may submit an application on behalf of a formal patient at any time.[243] The application is launched by sending notice of it "to the chairman of the appropriate review panel in the prescribed form."[244]

Hearing. The review panel, which ordinarily has 28 days within which to hear and consider the application,[245] is directed "[a]s soon as it is able to do so"[246] to "carry out whatever investigation and hearing it considers necessary."[247] Notice of the date, time, place and purpose of the hearing is to be given to the applicant, any person acting on his behalf, the nearest relative, any other person who may be affected by the application and whom the chairman considers should be notified, and "where appropriate, . . . the board of the facility."[248] The chairman may request from the board "such information as he considers relevant," and the board is bound to comply "without delay."[249] The board must also make the patient's records available to the panel no matter where the hearing is held.[250]

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[242] ACT 1972, supra ch. I note 1, s. 38(4). As noted supra note 226, application in respect of short-term detentions is precluded by the expression "formal patient." In 1964, the application for review could be made to challenge any detention, including 72-hour certification for examination--it was not restricted to patients under detention for one month or more. ACT 1964, supra note 142, s. 17(1). Although in theory the opportunity for review of short-term confinements is desirable, its practicality is questionable because the authority for detention is certain to have expired before the review panel has had time to make its investigation and report.

[243] ACT 1972, supra ch. I note 1, s. 38(4). In 1964, all complaints were limited to one per certification. ACT 1964, supra note 142, s. 17(3).

[244] ACT 1972, supra ch. I note 1, s. 38(1). Alta. Reg. 119/73, Form 5.

[245] ACT 1972, supra ch. I note 1, s. 41(1). The Minister may extend this period.

[246] Under the 1964 Act, investigations were to be carried out "forthwith" upon receipt of a complaint, the object being to "speedily determine the validity of the complaint." ACT 1964, supra note 142, s. 17(4); Alta. Reg. 675/64, ss. 13, 16, [Continued on next page.]

[Continued from p. 99.]
22, Form VIII as am. Alta. Regs. 14/68, s. 3(g); 197/68, s. 2(b). From the standpoint of the objecting patient, the 1964 direction is surely preferable to the present direction.

[247] ACT 1972, supra ch. I note 1, s. 39(2). There are no further statutory or regulatory guidelines as to or constraints on the manner and extent of investigation, and few on the nature and conduct of the hearing. Under the 1964 Act, it was open to the panel to interview the complainant in the presence of any person the panel considered should be present (Alta. Reg. 675/64, s. 19(1)), and the panel was obliged to conduct an interview upon the patient's request (id. s. 19(2)). The rules of evidence did not apply. Id. s. 20.

[248] ACT 1972, supra ch. I note 1, s. 39(1); Alta. Reg. 119/73, ss. 3(1), 10, Form 4. The 1964 legislation did not contain a section specifying who should be notified of the hearing, but the regulations filled in the gap. Alta. Reg. 675/64, ss. 14, 22, Form IX as am. Alta. Reg. 14/68, s. 3(f).

[249] Alta. Reg. 119/73, s. 3(1),(2).

[250] Id. s. 6.

Curiously, the Act does not give the applicant the right to make out his own case, either with or without the assistance of legal or other representation, or to call evidence on his own behalf. Instead, the review panel "may invite the applicant and any other person to testify or produce evidence at the hearing."[251] When evidence is presented, the applicant and his representative have "the right to be personally present,"[252] and "the right of cross-examination."[253] However, the applicant may be excluded "if in the opinion of the review panel there may be an adverse effect on the applicant's health by his presence."[254] Should this happen to an unrepresented applicant, the panel must "appoint a person to act on his behalf." No one else has any right to be present without the prior consent of the chairman.[255] What is more, "[e]xcept as permitted by the chairman, and except where the report is published by the applicant or his representative," publication of "any report of a hearing, investigation or deliberation by a review panel or the names of any persons concerned" is forbidden.[256]

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[251] ACT 1972, supra ch. I note 1, s. 39(2).

[252] Id. s. 40(2).

[253] Id. s. 40(3).

[254] Id. s. 40(2).

[255] Id. s. 40(1). In 1964, the permission of the Minister, on the recommendation of the chairman--and not that of the chairman alone--was required. ACT 1964, supra note 142, s. 18(1).

The chairman has power to adjourn a hearing "for any purpose he considers necessary." The adjournment may last up to 21 days,[257] and longer with the Minister's consent.[258]

Notice of decision. Once a decision has been rendered, the chairman has seven days within which to send a copy of it to the applicant, his nearest relative, and any person interested in the application.[259]

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[256] ACT 1972, *supra* ch. I note 1, s. 40(4) *as am*. S.A. 1973, c. 76, s. 10.

[257] *Id*. s. 40(5). The Act does not make it clear whether the power of the chairman to adjourn may take the hearing out of the 28-day period allowed for the review panel to hear and consider the application. As a matter of sequence, the power of adjournment appears in the subsection immediately preceding the setting out of the 28 days. (Provision for adjournment is new since the 1964 Act.)

[258] *Id*.

[259] *Id*. s. 41(3). Where the Minister, the Director or a board brought the application, he (it) is also entitled to a copy. *Id*. s. 41(5).

Note that the Act does not prescribe a time within which the decision must be made, although the legislators probably intended the decision to be made at the hearing because, in the usual case, the panel is directed to "hear and consider" the application within 28 days after its receipt by the chairman. *Id*. s. 41(1). (Query: does "consider" mean "decide"?) By comparison, barring an extension by the Minister, in 1964 the panel was constrained to hear and decide within a very short span of time: the decision was to be sent out within 14 days after receipt of the complaint. ACT 1964, *supra* note 142, s. 19(1).

Unlike today, in 1964 reasons for the rejection of a complaint could be demanded by the complainant's legal representative, although in 1968 the panel was authorized to withhold them if it agreed "that such disclosures would prejudice the health of the complainant or for any other special [Continued on next page.]

Effect of decision. The board of the facility in which the patient is detained is bound to give effect to the decision.[260] Nevertheless, the patient may elect to receive treatment on a voluntary basis where the board is willing and able to provide it.[261]

Appeal. An applicant has the right to appeal a decision of the review panel to the Supreme Court within 14 days of the decision,[262] and "the written report of the decision of the review panel shall include a statement of" this right where the application has been refused.[263] The appeal is a "rehearing of the matter on the merits."[264] It is to be taken by originating notice of motion,[265] supported by the applicant's

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[Continued from p. 102.]
reason;" reasons in support of a complaint were to be provided to the hospital superintendent as a matter of course. Alta. Reg. 675/64, s. 21(2) as replaced by Alta. Reg. 14/68, s. 2.

[260] ACT 1972, supra ch. I note 1, ss. 41(6), 48(1).

[261] Id. s. 48(2).

[262] Id. s. 46(1). The chairman has seven days from the date of the decision within which to send it to the applicant so, allowing for due course of mail, this does not leave the hospitalized applicant much time to act. No time for appeal was specified in 1964.

[263] Id. s. 41(4); Alta. Reg. 119/73, s. 12, Form 6.

[264] ACT 1972, supra ch. I note 1, s. 46(5) as am. S.A. 1975(2), c. 65, s. 7. Prior to this amendment, the scope of the appeal was a matter of some conjecture.

[265] Id. s. 46(2).

affidavit "setting forth fully all the facts in support of the application,"[266] served, not less than 15 days before it is returnable, upon

> (a) the Minister,
> (b) the chairman of the board of the facility in which the applicant is a formal patient (if the applicant is a formal patient), and
> (c) such other persons as the court may direct.[267]

and, in the main, the practice and procedure of the Court applies.[268]

The Court has power to

> (i) quash the decision and order the cancellation of the admission . . . or renewal certificates . . . , or
> (ii) order that the review panel reconsider the applicant's application for cancellation, or
> (iii) make such other order as it considers just,[269]

with discretion as to costs.[270] In the course of hearing the application, the Court may direct the giving of further evidence including "any transcript or minutes taken by the review panel at the original hearing."[271] The order of the

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[266] Id. s. 46(4).

[267] Id. s. 46(3).

[268] Id.

[269] Id. s. 46(8)(a). The jurisdiction of the Court was not articulated in 1964.

[270] Id. s. 46(7).

[271] Id. s. 46(5) as am. 1975(2), c. 65, s. 7.

Court is final.[272]

In the next Chapter, we discuss the policy of postponing the judicial component in the process for compulsory civil commitment to the review stage. We also examine the suitability of the procedures adopted by the review panel in the fulfillment of this role, paying special attention to the measures employed to safeguard the patient from wrongful interference with his liberty.

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[272] Id. s. 46(6).

CHAPTER V

APPLICATION OF PROCEDURAL PRINCIPLES

Review panels have now been in operation for over ten years. This period is significant for the reason that, assisted by the 1972 changes in the governing legislation, members have had ample time to grapple with the function of the panels and to refine the procedures followed in the fulfillment of that function.[1]

In the fall of 1974, the writer was privileged to obtain permission to observe a total of twelve hearings wherein the patient challenged the legality of his detention.[2] These hearings were conducted by three differently-constituted panels under three different chairmen. The observations were entered into for a twofold purpose: first, to assess the effectiveness of introducing the judicial component in the process for compulsory civil commitment at the review stage; and, second, to study the procedural practices pursued in terms of the requirements of the Mental Health Act, 1972 and of the principles of natural justice insofar as they supply the omissions under the Act.[3]

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[1] Notwithstanding the years of operation, there is a paucity of judicial authority and legal literature on issues concerning procedural fairness before review tribunals both in Canada and in England (where they have been functioning now for over fifteen years). Constitutional arguments addressing issues of procedural fairness have been made and considered in the United States where there is an abundance of literature, some of which can be usefully adapted to the Canadian scene.

[2] By coincidence, the writer also observed six certificate of incapacity hearings. (As to the purpose of these hearings, *see* p. 179 *infra*.) Where it is relevant, information acquired from these observations is incorporated into the ensuing discussion.

The writer also took in two half-day sessions of hearings by the Board of Review for Alberta--the counterpart of the review panel on the criminal side. This Board functions under the very able chairmanship of Mr. Justice

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[3] The Lieutenant Governor in Council has not designated mental health review panels as authorities to which the Administrative Procedures Act applies--a fact which renders the application of the principles of natural justice all the more important. See R.S.A. 1970, c. 2, s. 3 and Alta. Reg. 123/70 as am. Alta. Reg. 10/74. This Act was first passed in 1966 (S.A. 1966, c. 1) to control the exercise of administrative, quasi-judicial or judicial powers conferred by statute in Alberta. It provides for notice to all persons whose rights will be varied or affected by the act or decision of a statutory authority, the opportunity to furnish relevant evidence and make representations by way of argument, cross-examination, and the furnishing of reasons for decision. R.S.A. 1970, c. 2, ss. 2, 4, 5, 6, 8.

[4] The Criminal Code, R.S.C. 1970, c. C-34, s. 547, enables the lieutenant governor of a province to appoint a board to review the mental state of every person whom he has placed in "safe custody" or "safe-keeping" on account of insanity, mental illness, mental deficiency or feeble-mindedness--a jurisdiction which extends to persons found unfit to stand trial or acquitted on account of insanity, or removed from prison after conviction--, and to recommend the disposition appropriate to the person's state of recovery. The Code specifies that the board shall consist of "not less than three and not more than five members" (id. s. 547(2)) with three, including one psychiatrist and one member of the provincial bar, constituting a quorum (id. s. 547(4)). At least one review must be held during every six months (id. s. 547(5)).

Lieberman of the Trial Division of the Supreme Court, and is now in its ninth year of existence. Although its role is not identical to that of the review panel, the most notable distinction being that it is a recommending and not a deciding body, it nevertheless provides a worthy model for the conduct of review proceedings and one with which useful parallels may be drawn. The discussion below draws on observations of review panels and, where appropriate, of the Board of Review.

Although, in the main, statistical data on the operation of the review panels is not available (see Appendix 3 for an outline of data which could usefully be collected in a more empirically oriented study of the operation of review panels), the Annual Reports of the Division of Mental Health for the years 1965 through to 1971 do contain some figures which demonstrate that the review panel mechanism has had some impact on the detention process. This data, together with calculations derived from it, is recorded on the table which follows. As the table shows, a few patients (ranging from 2 in 1965 to 17 in 1970) obtained release in each of these years as the result of a hearing before a review panel. When compared with the total number of detentions authorized by certification, the percentage of releases is extremely low (see the figures on the years 1967 to 1971). However, the percentage is more impressive when the number of releases is compared with the number of complaints heard (ranging from 8.3% in 1966 to

TABLE: RESULTS OF APPLICATIONS TAKEN BEFORE REVIEW PANELS (1965-1971)

Year	Facility	Number of detentions authorized by certification	Number of complaints heard	Number of detentions in respect of which certificates cancelled	Percentage of complaints in respect of which certificates cancelled[1]	Percentage of detentions in respect of which certificates cancelled[2]
1965	Ponoka		21	2	9.5*	
	Oliver		4			
	Total		25			
1966	Ponoka		27	3	11.1*	
	Oliver		9	0	0.0*	
	Total		36	3	8.3*	
1967	Ponoka		30	3	10.0*	
	Oliver		22	5	22.7*	
	Total	1,622	52	8	15.4*	0.5*
1968	Ponoka		42	6	14.3*	0.8
	Oliver		41	7	17.1*	0.9
	Total		83	13	15.7*	
1969	Ponoka		34	1	2.9*	0.1
	Oliver		51	9	17.6*	0.7
	Total	2,058	85	10	11.8*	0.5

Year	Facility	Number of detentions authorized by certification	Number of complaints heard	Number of detentions in respect of which certificates cancelled	Percentage of complaints in respect of which certificates cancelled[1]	Percentage of detentions in respect of which certificates cancelled[2]
1970	Ponoka		40	6	15.0*	"very small indeed"
	Oliver		48	11	22.9*	
	Total		88	17	19.3*	
1971	Ponoka		38	4	10.5*	"very small indeed"
	Oliver		37	6	16.2*	
	Total		75	10	13.3*	

[1] Calculated as: $\frac{\text{no. of detentions in respect of which certificates cancelled}}{\text{no. of complaints heard}} \times 100.$

[2] Calculated as: $\frac{\text{no. of detentions in respect of which certificates cancelled}}{\text{no. of detentions authorized by certification}} \times 100.$

*Starred items represent original calculations. All other data is taken from the Annual Reports of the Division of Mental Health (Department of Health, 1965-1970; Department of Health and Social Development, 1971). Subsequent Reports do not record this information.

19.3% in 1970).[5] Even where the decision is adverse to the patient, it is likely that the substantiation of the medical opinion by an independent body enhances the patient's inclination to accept his detention. In addition, one would suppose that the possibility of being called upon to explain the medical decision to a judicial body suppresses any tendency which medical professionals might otherwise exhibit toward indiscriminate detention.

Examination of the intricacies of the procedural requirements which bind the review panel consume the bulk of this Chapter. But before delving into this repast, we shall defend that division of responsibility as between the mental health and legal systems which defers judicial considerations to the review stage, leaving the initial detention to medical decision.

A. Medical Detention Defended

The judicial ingredient may enter the process for compulsory detention for mental disorder either prior to detention, for the purpose of authorizing it, or after detention, for the purpose of reviewing the need for its continuation.[6] The present Legislature of Alberta has chosen the latter stage for the imposition of judicial safeguards, having entrusted the initial decision to detain to the discretion of medical professionals.[7] In so doing, the Legislature has accepted the notion that mental disorder, including the definition of normalcy, is essentially a medical problem and it has endorsed society's faith in the capabilities of medical science.[8]

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[5] The results of hearings since 1971 do not appear in the Annual Reports or elsewhere, but the writer is informed by the chairmen observed that the trend established under the 1964 Act continues.

The issue as to whether the judicial machinery should come into play before or after detention is both a sensitive and a difficult one. Understandably, therefore, the postponement of judicial consideration to subsequent review is not without its critics.[9] One commentator[10] goes

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[6] *Habeas corpus* presumably is available to ascertain the legality of the detention in the first place. Draper, in 3 BARKER PROJECT, *supra* ch. II note 8, at 73.

[7] ACT 1972, *supra* ch. I note 1.

[8] For a robust criticism of "medical imperialism," *see* SHUMAN, *supra* ch. II note 35.

[9] *See*, *e.g.*, WADDAMS, *supra* ch. IV note 210. In spite of provision in Ontario, much like that in Alberta, for subsequent review of the medical decision to detain, Waddams takes the following view:

> Except in an emergency the decision to commit to a mental hospital should be made by a tribunal, ideally by a tribunal including both a doctor and a lawyer. The patient should have a right to a hearing, access to independent legal and medical advice and the right to a judicial review on questions of law.

He concludes his comments by remarking that:

[Continued on next page. Note 10 also on next page.]

so far as to question the validity of admission by certification in the face of section 1(a) of the Alberta Bill of Rights[11] which recognizes and declares "the right of the individual to liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law." His argument runs thus: the phrase "due process of law" embraces "the right to a fair hearing in accordance with the principles of fundamental justice for

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[Continued from p. 112.]

> . . . at present we continue to take away people's freedom against their will with almost no procedural safeguards. It is curious that we take so much care to avoid the wrongful detention of a man in an institution called a prison, and yet allow a man to be detained in another institution with no more formality than the stroke of a pen.

Id. at 302. See also Roth, Dayley & Lerner, Into the Abyss: Psychiatric Reliability and Emergency Commitment Statutes, 13 SANTA CLARA LAW. 400 (1973) [hereinafter cited as ROTH ET AL.]. These authors even object to the exception of emergencies from the requirement of prior judicial consideration:

> In the absence of a genuinely scientific or objective standard of "mental illness," we urge the abolition of involuntary incarceration which is grounded in that label and in particular of the practice of emergency commitment, which authorizes detention on the authority of medical judgment alone, without judicial safeguards or a hearing of any kind.

Id. at 402.

[10] Draper, Due Process and Confinement for Mental Disorder, 14 ALTA. L. REV. 266 (1976) [hereinafter cited as DRAPER].

[11] S.A. 1972, c. 1.

the determination of [a person's] rights and obligations;" the Canadian Bill of Rights[12] so states in section 2(e) and the judgment of the Supreme Court of Canada in Curr v. The Queen[13] appears to verify the accuracy of such a supposition even though the Alberta Bill of Rights does not enumerate the right; a fair hearing means a hearing prior "to removal of the right to liberty and not something for which the individual must ask after freedom is lost;"[14] "[t]o hold otherwise relegates liberty from a right, to a mere privilege."[15] The argument is faulty in two respects. First, the words "due process of law" take their meaning from their historical embodiment--as the Curr case indicates--, and the right to a prior hearing is not now nor was it at the time of the enactment of either Bill of Rights a hard and fast rule of natural, or fundamental, justice. Although the determination of rights by subsequent hearing is unacceptable as a general rule, "in some cases the courts have held that statutory provisions for an administrative appeal or even full judicial review on the merits are sufficient to negative the existence of any implied duty to hear before the original decision is made."[16] There is also authority to the effect that the provision of a subsequent hearing which complies with the dictates of natural justice may cure a defect at first instance, a point which we pick up later in our discussion of the right to appeal. Second, the failure to provide for a hearing prior to detention does not necessarily and of itself reduce the right to liberty to a mere privilege. Under the Mental Health Act, 1972, the detention is not the result of arbitrary medical decision; rather, it is consequent upon the independent findings of two medical professionals that a person's condition meets certain objective legal tests. That is to say, no matter how elusive of precise definition those objective criteria may be, nevertheless there are legal fetters on the medical discretion to detain: the right to liberty may not be interfered with in the absence of the conditions precedent to certification and it revives with their cessation (as we shall see when we examine the scope of the inquiry taken by the review panel). In final rebuttal of the contention that sections 29 and 30 of the Mental Health Act, 1972 are inoperative because they deny "due process of law," we note that the majority judgment in Curr cautions courts against the substitution of a personal judgment for the wisdom of the elected representatives of the people acting within their constitutional competency in a matter of great social concern.[17]

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[12] R.S.C. 1970, App. III.

[13] [1972] S.C.R. 889, 26 D.L.R. (3d) 603, 7 C.C.C. (2d) 181, 18 C.R.N.S. 281.

[14] DRAPER, supra note 10, at 286.

[15] Id.

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[16] DESMITH, supra ch. III note 4, at 170.

The division of medical and judicial responsibilities currently adopted by the Legislature of Alberta commends itself to the writer as both prudent and fair. We are, after all, dealing with one phase of a health care delivery system in which many of the persons presented for examination and certification will be in a state of acute illness. The odds are high that there will be "a paramount need for prompt action" in circumstances "where it is impracticable to afford antecedent hearings"--two factors suggesting the permissibility of deviation from the general rule of a prior hearing.[18] Medical professionals are the most competent persons society has to offer to determine the presence of mental disorder--a condition we accept exists[19]--and the likelihood of danger, at least to self, if the disorder remains uncared for.[20] Where their judgment is exercised carefully and in good faith--and there is no reason to assume that it will be exercised otherwise--the incidence of wrongful detention should be low.[21] As one group of researchers concluded, after seven years of study in four of the United States,

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[17] Supra note 13, at 616 D.L.R., per Laskin, J. (as he then was). Case law other than Curr supports the view that the legal processes laid down by Parliament [or the Legislature] constitute "due process of law." See, e.g., R. v. Martin (1961), 35 C.R. 276, 35 W.W.R. 385, 131 C.C.C. 32 (Alta. C.A.); National Capital Commission v. LaPointe (1972), 29 D.L.R. (3d) 376 (Fed. Ct.); Levitz v. Ryan (1973), 29 D.L.R. (3d) 519 (Ont. C.A.), in which Curr was considered.

It is also noteworthy that the much applauded McRuer Commission did not object to that province's scheme for involuntary hospitalization coupled with provision for review. McRUER COMMISSION REPORT, supra ch. IV note 208, at 1232-35.

[18] DESMITH, supra ch. III note 4, at 167, 170.

[19] See p. 16 supra.

> 'over-judicialization' of commitment procedures tends to be clumsy and self-defeating: '[c]lumsy because . . . the vast majority of commitment cases do not involve contested issues and therefore do not require a procedural mechanism designed for contested issues; self-defeating because . . . the requirement of elaborate procedure in each of an unending flow of cases has the practical result not of stemming the tide but of quickening the flow. It is difficult to see how swift judicial disposition is an improvement on swift administrative or medical disposition.[22]

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[20] TANAY draws a distinction between the psychiatric term "prognosis," which "makes reference to the future course of an illness either in terms of the illness itself or the particular patient" and encompasses clinical states such as "suicidal" or "homicidal," and the legal term "prediction" which he says is foreign to the claims of psychiatry. *Supra* ch. II note 27, at 788 *et seq*. The phrase "likelihood of danger" is used here in a prognostic, rather than in a predictive, sense.

[21] The assertions from some quarters that mental disorder is a matter of social deviancy and not of disease, and the accusations that in purporting to be able to diagnose mental disorder medical professionals have encroached beyond the legitimate bounds of their expertise, have not gained wide acceptance to date. At the same time, the social undertones of the decision to compulsorily detail are undeniable.

[22] Gupta, *New York's Mental Health Information Service: An Experiment in Due Process*, 25 RUTGERS L. REV. 405, 409 (1971) [hereinafter cited as GUPTA], *quoting* ROCK, JACOBSON & JANOPAUL, HOSPITALIZATION AND DISCHARGE OF THE MENTALLY ILL, cc. 7 & 8 (1968), at 124.

The medical procedural protections legislatively prescribed further reduce the risk of wrongful detention by medical professionals: in the case of conveyance and examination, the restriction on the time after examination within which the certificate must be issued and of its effective duration after issue; and in the case of admission and renewal, the requirement of two independently issued certificates, the limitation of the duration of their authority, and the need for periodic medical reexamination and certification as a prerequisite to continued detention.[23]

In addition, historical experience supports the wisdom of the postponement of judicial involvement in the process for compulsory detention, and the move away from the court system to a review panel. It will be recalled that, before 1965, a justice of the peace played a part in involuntary hospitalizations of indeterminate length, either by issue of his warrant following a hearing on an information and a finding that a person was mentally diseased and dangerous to be at large or, in the case of dual medical certification, by directing the apprehension and detention of the person concerned. Being analogous to criminal proceedings, the requirement of the order of a justice of the peace created a stigma of wrongdoing on the part of the mentally ill person, and the hospitalization took on the appearance of punishment. Both the criminal overtones and the delays built into judicial authorization hindered medical therapy.[24] Because medical or other evidence was not usually introduced on behalf of the allegedly diseased person, justices tended to accept the opinion of the medical practitioner called in a hearing initiated by information, or of the certifying physicians where this was the case, and the signing of orders was prone to the accusation of mere formality.

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[23] _See_ pp. 85-90 _supra_.

Insofar as it emphasizes the importance of the liberty and physical integrity of the subject, the analogy with criminal proceedings is, of course, well-founded. However, to reiterate a recurrent theme of this paper, the issue of detention for mental disorder entails the interaction of the mental health and legal systems, and the best resolution of all competing interests does not lie at either extreme: just as the therapeutic objectives of hospitalization can be over-stated, so can strict adherence to the safeguards of criminal process be carried to excess because the goals of detention for mental disorder and of imprisonment for crime differ in important respects. On the one hand, "[t]he need for hospital confinement is . . . predicated on . . . the disorganization of the mind and the incapacity to function independently"[25] and the mental health system is therefore directed toward restoration of the disordered individual to normal social living through "cure". On the other hand, in addition to rehabilitation of the offender, the objectives of criminal sentencing include deterrence through punishment, and the application of safeguards designed to excise all possibility of wrongful punishment may "achieve nothing for the mentally ill except the freedom to suffer outside an institution" in inferior community facilities.[26]

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[24] Speaking of the legal proceedings which are prerequisite to the initiation of psychiatric treatment in many of the United States, one author claims that "[a] patient who suffers a profound alteration of consciousness will receive far better treatment if his condition is due to physical rather than mental causes." He rejects the arguments which support the distinction on the basis that "treatment for physical conditions is less coercive, more advanced and effective, and more readily comprehensible to the lay person" by the use of examples on the physical side. TANAY, _supra_ ch. II note 27, at 803-04.

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[25] Id. at 799.

[26] ALLAN STONE, supra ch. I note 5, at 43; TANAY, supra ch. II note 27, at 811. See also TANAY, id. at 800, where he declares that "[f]or a great many chronic psychotics, the constant care and supervision provided by psychiatric hospitals permits a day-to-day functioning which would not otherwise be possible."

The testimony of an ex-patient, twice institutionalized for severe depression, provides further evidence of the benefits of hospitalization:

> The way everyday life at the hospital is geared to the needs of the patient is necessary to their recovery. Imagine, if you can, having your thinking processes cut in half, your ability to concentrate practically nil, your limbs feeling as if you had heavy weights tied to them and the effort of simply getting up in the morning and brushing your hair a task so large as to be overwhelming.

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In contrast to the requirement of an order of a justice of the peace authorizing detention, the review panel mechanism permits that prompt medical treatment which is needed in most cases. Should review be requested, the panel is endowed, by its very composition, with independent expertise--medical, legal and social. The investigatory powers of the members enable them to ensure that all necessary relevant evidence is before them. Then, too, postponement allows the hospital staff time to observe the patient's behaviour and form more considered opinions as to his mental condition. Hearings may be held on the hospital premises, and court room formalities and evidentiary rules may be relaxed.[27]

[Continued from p. 120.]

> It was a real accomplishment to me when I could finally read one complete paragraph and comprehend it. I've always been an ardent reader but my illness left me so I couldn't concentrate long enough to remember what I'd read at the beginning of the paragraph by the time I'd reached the end.

Mrs. Rosemary Hofman, Letter to the Edmonton Journal, Monday, August 23, 1976, at 5.

Nor ought one to overlook the fact that the psychiatric problem itself may impair the patient's judgment in respect of his need for treatment. See BLAIS, supra ch. II note 10. TANAY presents the letter of a grateful ex-patient in support of this point. Supra ch. II note 27, at 804-05.

[27] The writer recognizes that some of the criticisms of analogy with criminal process could be met by substitution of an administrative tribunal similar to the review panel for the justice of the peace. That is to say, rejection of the analogy does not preclude separate consideration of the value of a pre-detention hearing as opposed to post-detention review. The discussion above has comprehended both points.

Although the writer does not believe that a remote risk of abuse in an individual case should be allowed to colour the entire hospitalization process, delaying the provision of the care which is warranted in the majority of cases, she is equally convinced that medical admission is defensible only (a) if it is backed up by prompt judicial review where the patient objects that his right to liberty has been violated and (b) if the procedures on review comply with judicial standards of fairness. As one pair of authors has stated, "In protecting the rights of persons subjected to the process [of commitment to a mental hospital], the compassionate attitutes of judges and doctors cannot supplant legally imposed safeguards."[28]

Surprisingly, the Report of the Percy Commission[29] which originally recommended the creation of review tribunals in England contains little discussion of the requirements of natural justice. The Commission's focus of therapeutic ends may account for this. Whatever the explanation, the legislative and practical consequence in Alberta where the English idea has been transplanted is over-solicitude for medical objectives at the expense of attention to proper judicial safeguards of individual liberty.[30]

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[28] MORRIS & LUBY, supra ch. II note 24, at 532.

[29] Supra ch. II note 10.

The importance of judicial review becomes strikingly apparent when one recalls from the analysis of the rationale for detention developed in Chapter II that the essence of the contest is patient against physician--the patient's concern for his personal freedom pitted against the physician's concern for his health. The social implications of the decision to detain also militate in favour of a judicial check on medical judgment, especially in light of the open-ended definition of "mental disorder" and the unreliability of medical predictions of dangerousness to others. Put another way, the existence of medical procedural protections does not obviate the importance of judicial determination in cases where the medical perspective on the issue of detention allegedly conflicts with the just social solution.[31]

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[30] Ironically, in implementing the recommendations of the Percy Commission England did not fall prey to the same oversight. The Rules made under the English Act (The Mental Health Review Tribunal Rules, 1960, S.I. 1960 No. 1139) are very attentive to the requirements of procedural fairness, and we shall refer to them now and again in the course of our ensuing analysis of the review process.

[31] WOOD claims it is arguable "that one of the important functions of a tribunal, if viewed not as a legal safeguard but as an integral part of the system, is to relieve the consultant [responsible medical officer] of absolute responsibility for the timing of release where his medical judgment is alone not enough because of the social advantages or difficulties involved." Supra ch. IV note 231, at 91. This view is tenable in Alberta where the Mental Health Act not only imposes responsibility for discharge on the board of [Continued on next page.]

Drawbacks naturally accompany deferment of judicial safeguards to the review stage. The most worrisome of these relates to the dulling force which detention and treatment may wreak on the patient's will and ability to object. As one author warns, "custodial confinement prior to the commitment hearing may produce an inhibitive or repressive environment."[32] The same author goes on to state:

> Furthermore, patients may be under sedation prior to or even during their appearance in court. In this connection, it has been observed that drugs such as thorazine, stellazine, and mellaril may diminish initiative, sap the individual's will to act, and reduce his resistance to erroneous incarceration.[33]

Another American commentator remarks that "the patient is often too heavily medicated to be of any assistance" to his legal counsel when they meet before the hearing.[34]

The disabling potential of electro-shock therapy is even greater, for this form of treatment impairs the recent memory. In one hearing observed by the writer, the patient

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[Continued from p. 123.]
the facility, but also permits the board to bring an application for review on behalf of the patient.

[32] Brunetti, The Right to Counsel, Waiver Thereof, and Effective Assistance of Counsel in Civil Commitment Proceedings, 29 SW. L. J. 685, 704, (1975) [hereinafter cited as BRUNETTI].

[33] Id., citing Partridge, Constitutional Requirements in Involuntary Civil Commitments, 2 MD. L. F. 89, 92 (1972).

[34] Litwack, The Role of Counsel in Civil Commitment Proceedings: Emerging Problems, 62 CALIF. L. REV. 816, 817 (1974) [hereinafter cited as LITWACK].

whom the evidence showed to have been extremely animated and hostile upon admission appeared at the hearing hopelessly confused as to the events leading up to and surrounding the admission, unable to grasp the nature and purpose of the review proceedings, and obviously incapable both of comprehending the case against her and of making out her own case. The hearing proceeded in spite of the ineffectiveness of the patient's presence and in the absence of the appointment of a representative. As was inevitable, it resulted in the panel's refusal to cancel the admission certificates.[35]

The facts of the electro-shock case suggest another consequence of deferring the hearing: according to one Alberta panelist, frequently a patient will launch an application for review before the commencement of therapy while his illness is still acute, but after medication or other treatment reduces the friction which initially abounded he will withdraw it. This phenomenon is capable of interpretation as a tribute to the success of treatment, or as a shortcoming of delay in hearing, for example where an otherwise normal person's incensed reaction to commitment is tranquillized.

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[35] In fairness to the three review panels observed, it must be noted that members customarily inquired into the medication or other treatment which the patient had undergone prior to the hearing. This information would give the medical members, at least, some measure by which to guage the effect of treatment on the patient's deportment at the

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Steps must be taken to minimize the debilitating effects of confinement and treatment during the period intervening between detention and review. One proposal embraces immediate and automatic scrutiny by the review panel of all detentions. However, it is doubtful whether the volume of admissions and renewals at either Alberta hospital is sufficient to sustain the continually-accessible tribunal necessitated by the requirement of "immediate". And "automatic" carries with it the risk of pro forma dispositions in lieu of real hearings--one basis at attack on judicial authorization of detentions in the first place and a risk to be avoided. The judicial body should contribute more than a "legal imprimatur for decisions made in another setting."[36]

In the writer's opinion, the imperfections of the review panel mechanism can be adequately alleviated, if not altogether cured, by the early introduction of a patient's advocate combined with provision for expeditious review upon the failure of that advocate to negotiate an arrangement with the hospital authorities which meets the patient's

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[Continued from p. 125.]
hearing, and a basis for making suitable allowances in judgment.

[36] Cohen, The Function of the Attorney and the Commitment of the Mentally Ill, 44 TEX. L. REV. 424, 449 (1966) [hereinafter cited as COHEN].

satisfaction.[37] In other words, the problems could be handled by the development of a specialized legal service which would go to the patient. Such a service should maintain independence from the mental health system, although it might well operate out of offices within the hospital. In this regard, the generally acclaimed New York Mental Health Information Service, which "was established to inform the patients of their rights to contest commitment and to assist the courts in making informed judgments on commitment and release at judicial review"[38] and which has been functioning since September 1, 1965,[39] is worthy of further study as are those schemes for similar facilities since set up in other states.[40]

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[37] As used in this context, the word "early" means immediately upon detention, or better yet, before it has taken place, for example, at the outset of an emergency or upon presentation of the individual for medical examination by a member of the staff of the facility.

[38] Felch, Access to Medical and Psychiatric Records: Proposed Legislation, 40 ALBANY L. REV. 580, 585 (1976) [hereinafter cited as FELCH].

[39] GUPTA, supra note 22, at 416.

[40] Literature on the subject includes: GUPTA, id.; Note, The New York Mental Health Information Service: A New Approach to Hospitalization of the Mentally Ill, 67 COLUM. L. REV. 672 (1967); Note, Hospitalization of the Mentally Ill, Due Process and Equal Protection, 35 BROOKLYN L. REV. 187 (1969); LITWACK, supra note 34; Andalman & Chambers, Effective Counsel for Persons Facing Civil Commitment: A Survey, A Polemic and a Proposal, 45 MISS. L. J. 43 (1974); Abrams, Legislative Efforts to Reform Civil Commitment, 1 MD. L. F. 12 (1971); Meyer, Lawyer in a Mental Hospital: [Continued on next page.]

The remainder of this chapter addresses the standard of procedural fairness required by the application of the principles of natural justice to the proceedings of review panels.

B. Natural Justice on Review

With the introduction of review panels, the application of the principles of natural justice to proceedings questioning the detention of a mentally disordered person became an issue. Prior to 1965,[41] a justice of the peace normally authorized the detention before it occurred. Although his powers were inferior to those of a magistrate (now a provincial judge),[42] the justice was nevertheless a functionary of the court system and as such was bound to exercise his discretion to issue an order for committal in accordance with the dictates of judicial principle and procedure. Had he issued his order or direction without first hearing and considering any objections sought to be raised

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[Continued from p. 127.]
The New York Experiment, 53 MENTAL HYGIENE 14 (1969); Geller, The New Mental Hygiene, N.Y.L.J., June 8, 1966.

The details of an adequate system for the delivery of legal services to the patient merit treatment beyond the bounds of this thesis; we do, however, mention the subject again in our brief discussion of legal representation in Chapter VI.

[41] The ACT 1964, *supra* ch. IV note 142, did not take effect until 1 January 1965.

[42] The Provincial Court Act, S.A. 1971, c. 86.

on the merits, he would have been in neglect of his duty. Admittedly, his authority to direct that a person be apprehended and detained in a hospital on the strength of two medical opinions was open to the interpretation that his role was administrative: the statutory provision made no mention of a hearing, nor did it allow for the certified person's presence before the justice--the phrase "apprehended and detained" suggests an uninterrupted movement to the hospital. On the other hand, the fact that he had a discretion as to the making of the order indicates the judicial quality of his function, and insofar as the wording of the legislation left room for the practice of rubberstamping the medical certificates it must, in this writer's opinion, be regarded as defective.[43]

Today, the review panel fills the judicial slot in the process for compulsory hospitalization, or such is the assumption upon which we have progressed so far in this paper. Classification of function as judicial, in contradistinction to administrative--a distinction which has taken on great significance in administrative law over the course of this century--[44] virtually ensures the obligation of a tribunal to observe the principles of natural justice, subject only to clear and explicit legislative direction to the contrary.[45] This does not mean that an administrative characterization inevitably excludes natural justice;[46]

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[43] The one mode of committal which did not first come before a justice of the peace was the order of the Minister of Health that a person be conveyed to a mental hospital for examination. It is submitted that, in making this order, the Minister also performed a judicial function requiring conformity with the precepts of natural justice.

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[44] The dichotomy is believed to date back to the retreat, in England, of the House of Lords in Local Government Board v. Arlidge, [1915] A.C. 120, from their broader endorsement four years earlier of the "duty lying upon everyone who decides anything" to "act in good faith and fairly listen to both sides" in Board of Education v. Rice, [1911] A.C. 179, 182, *per* Lord Loreburn, L.C. The *audi alteram partem* rule regained its vitality in England with the decision of the House of Lords in Ridge v. Baldwin, [1964] A.C. 40, in which Lord Reid, at 75-76, "repudiated the notions that the rules of natural justice applied only to the exercise of those functions which were analytically judicial." DESMITH, *supra* ch. III note 4, at 155; *see also* his prior discussion, *id.* at 136-55. The distinction continues to dominate Canadian jurisprudence, having been applied as recently as October 7, 1975 by a five-man majority of the Supreme Court of Canada in Mitchell v. The Queen (1975), 61 D.L.R. (3d) 77.

[45] R. V. Canada Labour Relations Board, *Ex parte* Martin, [1966] 2 O.R. 684 (Ont. C.A.); *see also* L'Alliance des Professeurs Catholiques de Montreal v. Labour Relations Board of Quebec, [1953] 2 S.C.R. 140, [1953] 4 D.L.R. 161, 107 C.C.C. 183.

[46] *See, e.g.*, Lazarov v. Secretary of State of Canada (1973), 39 D.L.R. (3d) 738 (Fed. C.A.), wherein Thurlowe, J., who delivered judgment for the Court, directed the Minister to conform to certain minimal standards of procedural fairness, notwithstanding that his discretion to grant or decline to grant a certificate of citizenship was plainly of an administrative nature. *See also* the dissenting judgment in the Mitchell case, *supra* note 44, at 83, wherein Laskin, C.J.C., with the concurrence of Spence and Dickson, JJ. does "not think it follows that a denial of justice or *quasi*-judicial status to a tribunal relieves it from observance of some at least of the requirements of natural justice. . . . Whether a hearing must be given, whether at least an opportunity must be given in some other way to meet an adverse decision or proposed decision, should not be determined merely by a

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however, it does render much less predictable the application of those principles embodied in the concept.[47]

[Continued from p. 130.] classification of the tribunal so as to carry the result by the mere fact of classification."

Both of these judgments are influenced by the trend of recent decisions in England, following upon Ridge v. Baldwin, _supra_ note 44. _See_, _e.g._, _In re_ H. K. (An Infant), [1967] 2 Q.B. 617; Reg. v. Gaming Board for Great Britain, _Ex parte_ Benaim and Khaida, [1970] 2 Q.B. 417 (C.A.); _In re_ Pergamon Press Ltd., [1971] Ch. 388 (C.A.); Furnell v. Whangarei High Schools Board, [1973] A.C. 660 (P.C.). Thurlowe, J. builds his reasoning upon Lord Upjohn's statement, in the Privy Council decision of Durayappah v. Fernando, [1967] 2 A.C. 337, 349, of the

> . . . three matters which must always be borne in mind when considering whether the principle [_audi alteram partem_] should be applied or not. These three matters are: first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of all these matters that the question of the application of the principle can properly be determined.

Laskin, C.J.C., likewise stresses the nature of the issue and the severity of the encroachment on individual interests:

> In my opinion, it is the substantive issue that a tribunal is called upon to determine, and its consequences for the affected person, whether in respect of his person, his status or his property, that ought to be considered as relevant to the application of the rules of natural justice.

Mitchell, _supra_ note 44, at 83-84.

[47] Clark describes the result of the application of the classification of "administrative" and "judicial" as a "stultifying shibboleth." _Natural Justice: Substance and Shadow_, PUB. L., Spring 1975, _at 27 [hereinafter cited as CLARK]_.

The importance of classification thus having been established, it is incumbent upon us to demonstrate why the function of the review panel is judicial. To do so, we must rest the panel toward the most court-like end of a continuum running between the two extremes of judicial and administrative. And, because there is no direct authority on the point either in Canada or in England, we must be guided by inferences drawn by way of analogy with other tribunals whose function has been considered in the courts--analogy which lacks precision and is not, therefore, wholly satisfying. In this, we find ourselves operating within that "vast area where the principle [_audi alteram partem_] can only be applied upon most general considerations."[48] For the convenience of the discussion below, these considerations have been grouped in accordance with their relevance either to the nature of the decision or to the process by which it is reached.

1. _Nature of the decision_

Two attributes of a decision which tend to substantiate that the function of a tribunal is judicial are: First, it affects existing rights as opposed to privileges; and second, in making it, the tribunal must adhere to an objective legal standard. Both attributes characterize the decision of the review panel.[49]

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[48] Durayappah v. Fernando, _supra_ note 46, at 349, _per_ Lord Upjohn.

As to the first attribute, the fact that personal liberty has been prized for hundreds of years and continues to assume a place of supremacy in our society's hierarchy of legal rights has been amply demonstrated in Chapter III. The mere contemplation of its loss to an individual who has committed no culpable transgression against society is stupefying. In passing the Mental Health Act, 1972 the Legislature has done nothing to abridge the fundamental importance of the right to liberty, much less ascribe to it the character of a mere privilege, and it ought therefore to be safeguarded by procedural measures conceived with extreme care.

The point that a decision which affects rights is ordinarily judicial in nature was made well by Rand J. in L'Alliance des Professeurs Catholiques de Montreal v. Labour Relations Board of Quebec.[50] In a liberal rendering

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[49] That the review panel has the power to render a conclusive decision on the issue of detention, and does not simply investigate or inquire for the purpose of recommending a disposition to a superior authority, is beyond doubt--the Mental Health Act, 1972 ensures that the decision will have binding force by obliging the board of the facility to give effect to it. ACT 1972, supra ch. I note 1, ss. 41(6), 48(1).

[50] Supra note 45, at 161. The original text reads as follows:

> When of a judicial character, they [the functions of a so-called administrative board] affect the extinguishment or modification of private rights or interests. The rights here, some recognized

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of his language to fit the context of review panel proceedings, he may be understood to have said

> When of a judicial character, the functions of a so-called administrative board affect the extinguishment or modification of private rights or interests. The right of liberty depends for its full exercise upon findings of the review panel; but it is not created by the panel nor is it enjoyed at the mere will of the panel (as a privilege might be); and the patient can be deprived of its benefits only by means of a procedure inherent in judicial process.

This statement must be read in light of the judgment some five years later in Calgary Power Ltd. v. Copithorne.[51] In that case, the Supreme Court of Canada upheld the expropriation of a right-of-way on Copithorne's land pursuant to ministerial order granted without notice to Copithorne and without giving him an opportunity to be heard. The relevant statutes were silent as to any requirement of notice and inquiry in relation to the determination of the issue whether Copithorne's lands were "necessary" for the construction of the transmission line proposed by Calgary Power Ltd., although there were "specific provisions as to notice and as to arbitration proceedings in relation to the determination of the

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[Continued from p. 133.]

> and other [sic] conferred by the statute, depend for their full exercise upon findings by the Board; but they are not created by the Board nor are they enjoyed at the mere will of the Board; and the Association can be deprived of their benefits only by means of a procedure inherent in judicial process.

[51] [1959] S.C.R. 24.

compensation to be paid in respect of the lands or interest in land expropriated."[52] Although a property "right" was clearly affected, the Court characterized the function of the Minister as administrative on the basis that his decision was a policy decision to be made in accordance with the statutory requirements and taking into account the public interest. The taking of lands owned by any one individual was incidental to the broader public purpose which the Minister was charged with determining.

In contrast, the decision to detain for mental disorder revolves directly around the alleged condition of a given individual, and the effect of the decision upon his right to liberty is not a mere incident of some other determination founded on broader policy grounds. The very factor which led the Supreme Court of Canada to adopt an administrative as opposed to a judicial classification in the Copithorne case is lacking in the context of detention for mental disorder where, but for the patient there would be no issue at all. In other words, Copithorne does not hamper our designation of the decision-making power of the review panel as judicial.

We turn now to the second attribute which tends to identify a decision as judicial, that is, the fettering of the discretion of the decision-maker. This attribute is so closely related to the first that the case law does not always treat the two as distinct. Indeed, on one analysis the discretion factor takes effect as no more than an adjunct of the rights-privileges distinction: a shackled discretion provides evidence that the decision affects a right whereas an unfettered discretion indicates that the decision pertains to a privilege. However, another analysis views "rights" and "privileges" as inherently different abstractions, each of which enjoys an existence independent of external endowments and restrictions. When the latter approach is adopted, the degree to which the scope of a decision-making power is constrained by the application of objective standards constitutes a second attribute from which to adjudge whether a function is judicial or administrative, for a judicial discretion knows bounds whereas an administrative discretion may not.

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[52] Id. at 33.

The writer contends that the criteria which govern the issue of the medical certificates authorizing detention for mental disorder also inhibit the discretion of the review panel to cancel or refuse to cancel them, and that hence the decision is judicial in nature. It is clear from section 41 of the Mental Health Act, 1972 that the panel may not cancel the certificates of a dangerous patient. And, although it is less clear from the wording of the Act itself, the writer will argue[53] that the panel must cancel them where the patient is not dangerous or where the other criteria for certification fail.[54]

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[53] See pp. 168-72 *infra*.

Nor does the recent, very hard decision of the Supreme Court of Canada in Mitchell v. The Queen[55] disturb our interpretation of the nature of the decision of the review panel and consequent conclusion that the panel performs a judicial function because, as will be evident shortly, that case is distinguishable on basic grounds. But first a recital of the facts which, to borrow the words of the dissenting Chief Justice, "tend to shock from their mere narration."[56] Mitchell was arrested by reason, without explanation, of suspension of his parole just one week before his three-year term of imprisonment was due to expire. Ultimately, and apparently without further reason or explanation, his parole was revoked. The Parole Act provided that as a consequence of his recommittal, he should re-serve that portion of his term of imprisonment during which he had been paroled. Mitchell had spent only 457 days of his total term of 1,157 days in actual custody! Relying on their reading of the Parole Act, the majority of the court found "the very essence of parole" to be "that it is a privilege accorded to certain prisoners in the discretion of the Parole Board and not a right to which all prison inmates are entitled."[57] And they invoked their own decision of the previous year in Howarth v. National Parole Board[58] in support of the proposition that the decision of the Parole Board is administrative in nature, saying:

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[54] In England, the Mental Health Act 1959, 7 & 8 Eliz. II, c. 72, leaves no doubt: the Mental Health Review Tribunal must direct that the patient be discharged "if they are satisfied (a) that he is not then suffering from [mental disorder]; or (b) that it is not necessary in the interests of the patient's health or safety or for the protection of other persons that the patient should continue to be liable to be detained." Id. s. 123(1).

[55] Supra note 44.

[56] Id. at 80, per Laskin, C.J.C.

> . . . the Parole Board is a statutory body clothed with an unfettered discretion in the administration of the Parole Act and [in exercising that discretion] it is not bound to act on a judicial or *quasi*-judicial basis. The very nature of the task entrusted to this Board, involving as it does the assessment of the character and qualities of prisoners and the decision of the very difficult question as to whether or not a particular prisoner is likely to benefit from reintroduction into society on a supervised basis, all make it necessary that such a Board be clothed with as wide a discretion as possible and that its decision should not be open to question on appeal or otherwise be subject to the same procedures as those which accompany the review of decision of a judicial or *quasi*-judicial tribunal.[59]

Unlike the mental patient detained on medical certificates, Mitchell was a convicted prisoner his parole notwithstanding. He had already lost his right to liberty, for the term of his sentence, upon his conviction by criminal process replete with its procedural and evidentiary protections.

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[57] *Id.* at 93, *per* Ritchie, J.

[58] (1974), 50 D.L.R. (3d) 349, 18 C.C.C. (2d) 385, 3 N.R. 391.

[59] Mitchell, *supra* note 44, at 93, *per* Ritchie, J.

His offence against society had been proven beyond challenge: his sentence was his due; parole was simply a reprieve, as the Parole Act made clear. That is to say, on the reasoning of the majority of the Supreme Court of Canada, the Parole Board exercised a wholly unfettered discretion over the serving of terms of imprisonment: it was obliged neither to grant parole nor to show cause why, having been granted, parole ought to be withdrawn. In contrast, there has been no conclusive finding of the facts which are prerequisite to the continued detention of an incarcerated patient, those being the concurrent existence of mental disorder, dangerousness and unsuitability for any other form of hospitalization. Judicial process is still wanting when the patient applies for review; indeed, the *raison d'etre* of the review panel is to supply that very process--to ascertain whether given conditions prevail and to render the determination dictated by the application of objective standards to the conditions as found. The patient is not seeking the privilege of being released before he has served his legally-imposed sentence; he is challenging the validity of the detention itself.

In sum, (a) Mitchell had lost his right to liberty whereas the patient appearing before the review panel is still entitled to be heard in respect of it; and (b) the Parole Board enjoyed a total discretion to do as it pleased whereas the discretion of the review panel is limited by statute.

2. Process for reaching decision

The degree of likeness between proceedings before a tribunal and court process provides another measure of classification along the judicial-administrative continuum. Although statutory silence as to procedure does not preclude characterization of the function of a tribunal as judicial, a close similarity between procedures statutorily imposed on a tribunal and those adhered to in a court of law is strongly indicative of a legislative intention to assign a judicial function.

The Mental Health Act, 1972 fixes the review panel with the obligation to follow many court-like procedures in the course of fulfilling its duty to hear and consider applications for the cancellation of admission or renewal certificates.[60] For example, a number of the trappings of court process are common to the review panel: the Act entitles the patient to notice of the hearing;[61] presence during the presentation of evidence;[62] representation;[63] and cross-examination.[64] And the members of the review panel have many of the powers of a court. As commissioners of inquiry,[65] they may summon witnesses, take evidence on oath, and require the production of documents and things,[66] and for these purposes they are endowed with the same power of enforcement "as is vested in a court of record in civil cases."[67] Furthermore, they have "the same privileges and immunities as a judge of the Supreme Court of Alberta."[68]

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[60] ACT 1972, supra ch. I note 1, s. 19(1)(a).

[61] Id. s. 39(1).

[62] Id. s. 40(2).

[63] Id.

[64] Id. s. 40(3).

Procedural divergences hamper the analogy somewhat; however, they do not alter the judicial character of the panel's overall function as assessed on this basis. One such difference is suggested by the fact that the patient has no clear-cut right to make representations or adduce evidence at the hearing although the panel may "invite" his testimony or that of anyone else.[69] (We will argue that this right may and ought to be inferred from the context of the Act.)[70] Another provision permits the panel to exclude the patient from the hearing if it anticipates that his presence may jeopardize his health.[71]

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[65] Id. s. 22(1).

[66] The Public Inquiries Act, R.S.A. 1970, c. 296, s. 3, quoted supra ch. IV note 237.

[67] Id. s. 4, also quoted supra ch. IV note 237.

[68] Id.

[69] ACT 1972, supra ch. I note 1, s. 39(2).

[70] See pp. 192-96 infra.

[71] ACT 1972, supra ch. I note 1, s. 40(2).

As useful as noting the resemblances between the trappings of procedure and the powers of the decider may be, comparison on these heads fails to illuminate three fundamental traits of court process which derive from its adversary base--(1) the existence of a lis inter partes (2) heard by a neutral judge (3) who assumes a predominantly passive role during the proceedings. Further description is commonplace: the "adversary process," as it is often called, presupposes the existence of two or more opposing parties and of an independent, impartial judge to whom the parties may turn for resolution of their dispute; each party is expected to adduce the evidence upon which he intends to rely and to make the strongest arguments available to him as to why the judge should accept his view of the matter; the procedure is premised on the assumption that between or among them, the parties will put all the relevant evidence before the court; and, as a general rule, the judge is not permitted to go beyond the evidence presented by the parties, and he does not enter the arena.

At a blush, review panel proceedings are suggestive of adversarial process. First, there seems to be a lis inter partes. The patient, as applicant, has a very definite interest in the outcome of the proceedings; and the responsible physician, as the agent of the mental health system, is adverse in interest--but for the medical assessment of the patient's mental condition, there would be no application for review of his detention. Reid[72] suggests an analytical distinction between two-cornered and three-cornered proceedings which helps illustrate the adversarial resemblance. It runs this way:

> Courts are "three-cornered" contests in which the judge is in the neutral corner. Many tribunals, notably of the licensing or disciplinary types, are "two-cornered" only; the contest is between the tribunal and the party. . . . In licensing matters [for example], there is a suppliant and a disposer; the issue is between them and they are "opposed" in as real, if different, a way as the contestants in a lawsuit.[73]

According to Reid, speaking in the context of bias, it is because of this unstated difference that courts consistently refuse to impose the court standard in a two-cornered situation, whereas "a three-cornered tribunal *should* be subject to the court standard."[74] Resorting to this analysis, the certification stage of compulsory detention for mental disorder is two-cornered: the protesting patient is the counterpart of the suppliant in a licensing case; and the two medical examiners, precommitted by their profession to furtherance of the paternalistic aims of the mental health system, together are akin to the disposer. The imposition of an unbiased decision-maker renders the review procedure three-cornered and the responsible physician, successor to the disposer as the proponent of mental health objectives, sits in a corner opposite the patient. Insofar as the physician advocates the interest of society, his role before the review panel is, perhaps. most comparable to that of the prosecutor in a criminal proceeding.[75]

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[72] R. REID, ADMINISTRATIVE LAW AND PRACTICE 244-46 (1971) [hereinafter cited as REID].

[73] *Id.* at 244. Reid labels the "appeal" function as three-cornered. *Id.* at 246 & n. 109.

[74] *Id.* at 245.

Second, the restriction of eligibility for membership on the panel[76] is designed to ensure its independence and to fend off accusations of bias based on interest in the proceedings.

Upon closer examination, the analogy thus far breaks down, as is evident from the following discussion of the same two points.

First, the finding of a lis inter partes depends on the depiction of the patient and the physician as opposing parties in a contest between societal and individual interests. But truth be told, the doctor is neither party nor prosecutor; he attends the hearing and expresses his medical opinion at the behest of the review panel, not pursuant to any requirement of statute or regulation. Nor is he strictly "adverse" in interest, for his primary concern is the "good of the patient" although, in assessing that "good," he will be prone to prefer the patient's health over his liberty and to this extent he is undeniably partisan.

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[75] In one case observed by the writer, the responsible physician assumed this very role. Instead of simply stating his medical opinion, he bombarded the patient with a raft of questions by which he sought to gain confessions and admissions against interest.

[76] ACT 1972, supra ch. I note 1, s. 21.

Second, although the review panel is independent, there is room for doubt as to its impartiality. Indeed, its very composition--one lawyer, one psychiatrist, one physician or therapist, and one person representative of the general public--[77] is planned so that each member will bring to bear on the issue not only the expertise but also the biases of the discipline or interest he represents. The collective effect is, nevertheless, that of the application of a balanced impartiality to the interests in need of adjustment: the medical members are expected to contribute independent opinions as to the patient's mental condition; the lay member, to reflect the concerns of society both for the patient's well-being and for the safety of others; and the solicitor-chairman, to apply his knowledge of the rules of fair process and decision. Moreover, the expectation that a member will hold predispositions of a general character should not prevent him from greeting the facts of the case at hand with an open mind, as he has a duty to do,[78] and we will say more about this later.

Neither of these deviations from adversary process is critical to a judicial characterization of the function of the review panel. A labour relations board, a workmen's compensation board, and a special inquiry officer with the Department of Citizenship and Immigration all have been held to exercise a judicial function notwithstanding the absence of a true *lis inter partes*.[79] Labour relations boards also exemplify the fact that a tribunal whose members are selected as representative of certain interests may perform a judicial function.

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[77] Id s. 19(2).

[78] See, e.g., Re Gooliah and Minister of Citizenship and Immigration (1967), 63 D.L.R. (2d) 224 (Man. C.A.).

It is only when we address the third fundamental trait of adversarial process, the passivity of the decision-maker toward the gathering and presentation of evidence, that the inadequacy of the term "adversary" to describe the process of the review panel becomes clearly apparent. Under the provisions of the Mental Health Act, 1972 the panel need not make a determination solely on the basis of the evidence adduced by the "parties" before it. To the contrary, it has a duty of investigation;[80] it is admonished actively to seek out evidence. The writer suggests that this duty to investigate is susceptible of interpretation as a duty to go beyond the evidence and representations of the applicant and the responsible physician in order to find all the material facts, and then to decide rightly on the basis of all the information before it. Playing the game of adjectival selection on the strength of this analysis, the word "inquisitorial" far more aptly describes the process contemplated than does the word "adversarial". Certainly, those persons originally responsible for the notion of mental health review tribunals (the members of the Percy Commission)[81] did not envisage an "adversial" process. They spoke of "a right to apply for an independent investigation"[82] and proposed a wide use for investigative powers:

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[79] John East Iron Works, Ltd. v. Labour Relations Board of Saskatchewan, [1949] 3 D.L.R. 51, [1949] 1 W.W.R. 842 (Sask. C.A.); Reg. v. Workmen's Compensation Board, *Ex parte* Kuzyk (1968), 69 D.L.R. (2d) 291 (Ont. C.A.); *Re* Gooliah, *supra* note 78.

[80] ACT 1972, *supra* ch. I note 1, s. 39(2), which reads in part: "As soon [after receiving an application] as it is able to do so, the review panel shall carry out whatever investigation . . . it considers necessary."

> The members of the review tribunals would be expected to make their own investigations, as well as receiving the opinions of the hospital and local authority staff and any opinions which are put to them by or on behalf of the patient or his relatives or friends. The medical members should have an opportunity of examining the patient personally in private, either together or singly. The tribunal should also be able to make its own enquiries about the care which would be available if the patient were discharged and the prospects of suitable employment for him; for this purpose they should be able to visit the patient's home if they wish, as well as receiving reports from social workers and evidence from the patient, his relatives or friends, prospective employers or others interested in the case.[83]

Indeed, whereas a decision reached through adversary process is based on the evidence gathered by the disputing parties and presented by them to an essentially passive judge, in an inquisitorial proceeding the decider is obligated to take such investigative steps in advance of the hearing and actively to make such inquiries at the hearing as will ensure that the decision is founded on all the relevant evidence. Looked at in this light, it becomes obvious that the members of the review panel are cloaked with the powers of a commissioner of inquiry for purposes of investigation, and that the conferment of these powers bespeaks a resemblance to inquisitorial rather than adversarial process.

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[81] PERCY COMMISSION REPORT, supra Ch. II note 10, at 148-53.

[82] Id. at 149.

[83] Id. at 151.

Slotting review panel proceedings into the inquisitorial mold helps to explain the two initial points of departure from adversary process. First, whereas an adversarial proceeding is three-cornered and revolves around a lis inter partes, an inquisitorial proceeding may be either two-cornered or three-cornered and it may or may not comprehend a lis inter partes. An important particular to note here is that making the responsible physician a party, in the adversarial sense, before the review panel would add an unnecessary and undesirable element of contentiousness to the hearing--an element which, should the review panel uphold the detention, could cause irreparable harm to the physician's continuing relationship with the patient. A straight-forward statement of medical opinion together with the facts underlying it ought to be quite sufficient for the purpose of determining the issue of detention on the basis of the patient's true mental state as educed from inquiry.

Second, whereas the judge in an adversarial proceeding must be independent and impartial, the decision-maker in an inquisitorial proceeding may begin from a position of bias as long as he keeps an open mind toward the facts of the instant case.

The realization that the review panel process is inquisitorial rather than adversarial is not fatal to the determination that its function is judicial, as we learn from the decision of the Ontario Court of Appeal in Reg. v. Workmen's Compensation Board, Ex parte Kuzyk.[84] In that case, Kuzyk availed himself of a final hearing before the Board to dispute the % permanent disability rating fixed by an internal appeal tribunal in respect of his compensable injury. The Act itself did not prescribe any review or appeal procedure, although it did empower the Board "to make or order any inquiry that it [deemed] necessary,[85] and to act upon the report produced as the result of an inquiry,"[86] and permitted it to reconsider a matter previously dealt with. The Act further enjoined the Board "to found its decision 'upon the real merits of the case,'" without binding it to follow "'strict legal precedent.'"[87] For the purpose of fulfilling these provisions, the Board had set up its own "hierarchical system of adjudication,"[88] which culminated in the hearing before the Board itself. At that hearing, the Board was willing to receive evidence adduced by the claimant but also reserved to itself the right to rely on material already on file and to make or order further investigations. The judgment recognizes that the Board "was itself involved in the dispute upon which it was adjudicating" and was not therefore "in the position of resolving a strict _lis inter partes_;"[89] however, the availability of the internal review or appeal procedure "having been held out and invoked, the Board was obliged to conduct the hearing in conformity with the dictates of fairness or natural justice."[90]

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[84] Supra note 79.

[85] This wording is not unlike that of s. 39(2) of the Mental Health Act, 1972. See supra note 80.

[86] Kuzyk, supra note 79, at 295, per Laskin, J.A. (as he then was), who delivered the judgment of the Court.

[87] Id.

The _Kuzyk_ case stands as authority for the application of natural justice principles to the proceedings of a tribunal endowed with the powers both of inquiry and of conclusive decision where a hearing is provided.[91] The review panel enjoys the concurrence of the same two powers. Moreover, two features which distinguish it from the Workmen's

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[88] _Id._ at 292.

[89] _Id._ at 295.

[90] _Id._

[91] Frequently, inquisitorial powers are conferred in a two-cornered situation in which the tribunal has capacity to recommend a result but not to render a final decision. This combination of powers tends to bring different considerations into play. _See, e.g._, Guay v. LaFleur, [1965] S.C.R. 12.

Compensation Board in Kuzyk enhance the arguments favouring judicial characterization of its function: (1) the review panel is compelled to hold a hearing and does not do so on a merely voluntary basis; and (2) it displays more traits characteristic of a three-cornered than of a two-cornered tribunal. On the other hand, whereas the Kuzyk Board had a statutory obligation to decide justly on the merits, a similar duty can be only inferentially ascribed to the review panel--but this is not a point of consequence to the duty to act judicially.

A decision of the Manitoba Court of Appeal lends additional support to the proposition that a judicial function may be attributed to an inquiring body which possesses the power of decision following a hearing. In the case of Re Gooliah and Minister of Citizenship and Immigration,[92] an immigration officer within the Department had been appointed a Special Inquiry Officer for the purpose of determining whether Gooliah had ceased "to be in the particular class in which he was admitted as a non-immigrant." The Immigration Act, which provided for such an appointment, also directed that an inquiry "shall be separate and apart from the public but in the presence of the person concerned wherever practicable," and that at the conclusion of the hearing the Officer "shall render his decision as soon as possible" again

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[92] Supra note 78.

"in the presence of the person concerned wherever practicable." In the event of an adverse finding, the statute instructed the Officer to make an order for deportation. The majority of the Court characterized the role of the Special Inquiry Officer as *quasi*-judicial without hesitation, thereby rendering certain ingredients of natural justice essential to a fair hearing.[93]

Furthermore, there is precedent on the criminal side of the mental health field sustaining the duty of a board of review--the counterpart of the civil review panel[94]--to conduct itself judicially even though it is a recommending and not a deciding body. Such was the conclusion reached by the Federal Court in the New Brunswick case of *Re Lingley and Hickman*[95] which addressed the issue of the availability of declaratory relief:

> Here we have an investigative board, which does not decide, but which reports to someone else who decides. In the course of the Board's review and report, it is required to interpret the word "recovered." If the Board reports on the basis of what may be a wrong interpretation of the statute, and if such report acted upon deprives an individual of his rights or liberties, he should, it seems to me, be given the elementary right of obtaining a decision on the law which was the basis of the report before his rights or liberties are irredeemably infringed or destroyed by administrative action.

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[93] *Id.* at 228, *per* Freedman, J.A.; at 238-39, *per* Guy, J.A.

[94] *See supra* note 4.

[95] (1972), 33 D.L.R. (3d) 593.

> The purpose of creating a review board in these circumstances is to assist the Lieutenant-Governor in coming to a proper decision. The statute requires that at least two members of the Board must be duly qualified psychiatrists and at least one member of the Board must be a duly qualified solicitor. In my view, one is entitled to assume that the Lieutenant-Governor acting prudently and judiciously would give much weight to the considered opinion of a Board like this--heavily weighted as it is with personnel equipped with expertise so relevant to the issues in cases of this kind. If my assumptions are correct, then the deliberations and conclusions of such a board become important indeed to the individual concerned whose liberty may be at stake. Surely, in these circumstances, it is vital that the principles of natural justice be observed by a board such as this.
>
> If the principles of natural justice are not followed by such a board, if such a board, acting on improper principles, makes an improper report to the Lieutenant-Governor, can such an injustice ever be corrected at a later date? I think not, as the critical point in the total proceedings might well be at the Board of Review stage.
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> . . . .
>
> Put another way, the report and recommendations of the Board of Review to the Lieutenant-Governor sets in motion a chain of events leading to a determination of rights affecting the liberty of the individual in question.[96]

Obviously, the case for procedural fair play is bolstered where, as is so of the review panel, the hearing tribunal actually determines the consequences to the patient flowing from its assessment of his mental condition.

The foregoing discussion attests to the validity of our initial classification of the function of the review panel as judicial. Not only is an existing right affected by the application of objective tests which limit the panel's decision-making discretion, but also the procedural trappings are predominantly court-like. Moreover, we have shown that resort to inquisitory as opposed to adversary process sits compatibly with a judicial characterization of function.

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[96] Id. at 598-99, per Heald, J.

The presumption in favour of natural justice follows. However, as deSmith tells us, "[t]he rules of natural justice are not rigid norms of unchanging content, and their ambit may vary according to the context."[97] We therefore move on to examine their ambit on an application before the mental health review panel.

But first, let us stress that, far from inhibiting the operation of procedural fair play to the detriment of the patient, the inquisitorial nature of the review panel process adds dimension to the protections already inherent in natural justice. Absent this measure, the forces of the mental health system would weigh against the patient in overwhelming disproportion, for the patient is the captive of the system. Mental health personnel wield the power of circumstance; they hold the key to the outside world, including the independent legal advice and medical opinion there available. Given these restraints on his activities, fixing the patient with the burden of making out his own case, or of rebutting that made out against him, would be tantamount to denying him justice. Just as in bygone times, when the paternal and protective jurisdiction in Lunacy (which could not determine rights as between the lunatic and others) was assisted by inquisitorial powers unknown to Chancery (which determined rights between hostile parties) as such,[98] so today the problems related to mental disorder demand a unique blend of protections and powers for their proper resolution.

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[97] DESMITH, supra ch. III note 4, at 141.

3. Entitlement to be heard

Both limbs of the concept of natural justice, the right to be heard and the absence of bias in the decider, are essential to fairness in the performance of a judicial function. Below we examine the dictates of the first limb for mental health review panels, postponing for the moment our consideration of issues related to bias.

a. Notice of right

To reiterate the first rule, any person whose immediate interests may be adversely affected by a decision or its outcome should be afforded an opportunity to state his position. Or, as it was said in one case in language strikingly similar to Cap. 29 of Magna Carta:

> No proposition can be more clearly established than that a man cannot incur the loss of liberty or property . . . by a judicial proceeding until

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[98] THEOBALD, supra ch. IV note 6, at 59-60.

> he has had a fair opportunity of answering the case against him, unless indeed the Legislature has expressly or impliedly given an authority to act without that necessary preliminary.[99]

As we noted in Chapter IV,[100] the Mental Health Act, 1972 contains provisions designed to ensure that the formal patient knows of his right to apply to the review panel for cancellation of the certificates authorizing his detention, and to assist him in the exercise of that right. Such measures include directing the board of the facility to give the patient and his nearest relative a written statement of

(i) the authority for his detention and the period thereof,

(ii) the function of the review panels,

(iii) the name and address of the chairman of the appropriate review panel, and

(iv) his right to apply to the review panel for cancellation of the admission certificates or renewal certificates;[101]

accommodate the patient in his own language;[102] and "do such other things" as are "expedient to facilitate the submission" of applications.[103] The information communicated pursuant to the Act is supplemented by posters on conspicuous display in every ward which announce the availability of legal aid to help qualifying patients bring application for review.

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[99] Bonaker v. Evans (1850), 16 Q.B. 162, 171, *per* Parke, B.

[100] *See* p. 98 *supra*.

[101] ACT 1972, *supra* ch. I note 1, s. 36(1)(d).

[102] *Id*. s. 36(3).

[103] *Id*. s. 36(4).

b. Conduct of hearing

Although an oral hearing, in lieu of written submissions, is not a mandatory requirement of natural justice,[104] the numerous references in the Mental Health Act, 1972 to a "hearing" suggest that an oral hearing is contemplated.[105] For example, hearing and considering applications from formal patients is the express justification for establishing a review panel[106] and the powers of a commissioner of inquiry are conferred in furtherance of the duty to hear applications;[107] the panel, which is instructed to carry out whatever hearing it considers necessary and may invite testimony and the production of evidence at the hearing,[108] has

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[104] See, e.g., Reg. v. Quebec Labour Relations Board, Ex parte Komo Construction Inc., [1968] S.C.R. 172, 175, (1967), 1 D.L.R. (3d) 125, 127, per Pigeon, J. (trans.):

> . . . it is important to note that [the audi alteram partem] rule does not imply that there must always be a hearing. The rule does require that each party be given the opportunity to put forward its arguments.

[105] According to DESMITH, "when the words 'hearing' or 'opportunity to be heard' are used in legislation, they nearly always denote a hearing at which oral submissions and evidence may be tendered." Supra note 16, at 177.

[106] ACT 1972, supra ch. I note 1, s. 19(1)(a).

[107] Id. s. 22(1).

[108] Id. s. 39(2).

28 days to hear and consider the application;[109] the chairman is obliged to give notice of the date, time, place and purpose of the hearing,[110] and has power to adjourn a hearing for up to 21 days;[111] and, finally, there are prohibitions on the publication of any report of a hearing.[112] Moreover, unless they are read in the context of an oral hearing, the right of the patient and his representative to be "personally present" while the panel receives evidence[113] and the right of cross-examination[114] lack substance.

In practice, the review panels do hold oral hearings. The Oliver panel (Alberta Hospital, Edmonton) habitually sits twice a month, and the Ponoka panel (Alberta Hospital, Ponoka) once a month. The hearings are held in private, as the Act directs,[115] on the hospital premises, a choice dictated by considerations of convenience. The physical setting of the hearings at each facility is pleasant--although the room allocated to the Oliver panel is somewhat incommodious for lack of space--and the tone is informal. The patient (his exclusion for health reasons appears to be rare) and his representative, if he has one, attend as they have the statutory right to do.[116]

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[109] Id. s. 41(1).

[110] Id. s. 39(1).

[111] Id. s. 40(5).

[112] Id. s. 40(4).

[113] Id. s. 40(2).

[114] Id. s. 40(3).

[115] Id. s. 40(1).

Having established the fact of oral hearings, we begin our examination of their conduct by noting features which attest to the informal tone adopted, the opportunity for informality being one reason frequently tendered to support the substitution of an administrative tribunal for a court of law. Next, we consider those elements which conduce to the participants' understanding of the purpose and form of the proceedings in which they are engaged and of their respective roles in it. Finally, we identify and comment upon certain inquisitorial techniques employed by the panel. Where appropriate, the discussion incorporates comparisons with the proceedings of the criminal Board of Review[117] which body has evolved an orderly and judicious process of inquiry.

The relaxation of normal court practices is signalled by the location of review panel hearings on the hospital premises for the convenience of the patient. The conference-style arrangement of the rooms chosen at Oliver and Ponoka for the hearings further contributes to the air of informality.[118] Coffee is provided and it may be sipped during the course of the hearing.

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[116] Id. s. 40(2).

[117] See supra note 4.

In a further departure from court room formality, as soon as the patient (and his representative, if he has one) enter the chairman makes some verbal overtures in an endeavour to inspire ease. Usually this prelude involves the introduction of panel members and others present for the hearing, a practice also adopted by the Board of Review. Two of the three chairmen within the writer's experience asked each patient if he had any objection to the attendance of an observer. None had.[119] In one case, the patient requested the comfort of a particular nurse's presence during the hearing, and the necessary permission was granted.[120]

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[118] Patients and other witnesses scheduled to appear before the panel are obliged to wait on hard-back chairs lined up along the wall of the corridor outside the conference room in easy view of passers-by, a practice which detracts somewhat from the effectiveness of efforts otherwise taken to relieve their awkwardness. Sometimes the wait spans hours. An exception was accorded to physicians at Ponoka--they were instructed to remain near at hand, on "standby", but did not have to await their turns lined up in the corridor.

[119] In a thirteenth case, after having initiated a private conversation with him in the corridor, the chairman bid the writer to leave in apparent dference to the wishes of the patient's ex-husband.

[120] Compare this with a case concerning the cancellation of a certificate of incapacity in which the applicant, who was no longer hospitalized, had brought a friend with her: when that friend made motions as if to accompany the applicant into the hearing, she was quickly excluded because she did not claim entrance as the applicant's "representative."

As is also appropriate to the informal vein, the evidence is seldom sworn[121] and other strict rules of evidence are not adhered to.[122]

Informality notwithstanding, it is important that the participants in the hearing understand its purpose, the order of procedure and their own roles in it. Indeed, fairness demands that the patient, especially an unrepresented one, comprehend the process which he has activated. If it bewilders and distresses him, the much lauded "informality" will have defeated its own objective.

Even so mundane a matter as the physical arrangement of furniture and the designation of seating locations within the hearing room may either elucidate or obscure the relationships of those present one to another--whether they be on the same side of the case, or opposed in interest, or deciders. The Ponoka panel and the Board of Review, evidently conscious of this fact, utilize purposeful physical set-ups which supplement the chairman's introductions--these have a tendency to be hasty--by illuminating the relative roles of those present.[123] However, at Oliver patients and other newcomers met noticeable difficulty in associating names and faces with roles. There, all actors sit around one table designed to accommodate a limit of eight.[124]

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[121] The writer witnessed no instances of sworn evidence.

[122] The fact that they are used infrequently does not of itself obviate the need for the powers of the panel members to subpoena an unwilling witness and to require an uncooperative or hostile witness to give evidence on oath.

[123] At Ponoka, the three panel members sit along one side of a square-cornered horseshoe formed by adjoining tables, with the patient and doctor at each extreme of the opposite side. The chairman assumes the position at the base of the [Continued on next page.]

Just as the physical set-up is capable of illuminating the roles of those present, so too can the sequence of unfolding of the evidence help to reveal the issues and the positions of the participants in respect of them. With this in mind, the chairmen usually follow the performance of introductions with a statement of the purpose of the hearing and an outline of the general plan of procedure. The chairman of the Board of Review likewise enlightens each new counsel, explaining that the Board, which is inquisitorial, acts in a quasi-judicial fashion heeding the tenets of

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horseshoe, near the patient. For purposes of observation, the writer sat well out of the way at a table which, had it been adjacent, would have closed in the open end of the horseshoe.

At the time of the writer's attendance at hearings by the Board of Review, a civil service strike was in progress. Undaunted, the Board adopted a meaningful physical arrangement in the temporary quarters borrowed for the hearings: the Board itself took up a prominent position behind a table placed at the head of the room; the patient and his counsel (in all hearings observed, the patient had legal representation) occupied a separate table which ran lengthwise along the room to the right of the Board; the responsible physician was assigned to a table at the end of the room opposite the Board; a reporter sat at a table on the remaining side of the room; and relatives, whose attendance seemed to be encouraged, and other observers occupied chairs located in the corner between, and some distance back from, the patient and the physician. The centre of the room was open.

[124] The addition of an observer undoubtedly complicated the exercise.

natural justice. This is an important step. Unfortunately, in some instances the writer felt that the review panels did not convey the order of procedure to the patient with adequate precision.

As to the procedure itself, the writer was favourably impressed by the practice of the Board of Review. That Board commences by raising the issue of the patient's presence. If the responsible physician recommends that the patient be absented from the hearing by reason of the anticipated adverse effect on his health should he remain, the patient's counsel is granted the choice of abiding by the recommendation or ignoring it.[125] Once this issue has been dealt with, the Board proceeds to hear from the responsible physician, the patient, the patient's witnesses, and relatives or other interested persons in that order--a sequence which highlights the essential controversy between the physician and the patient while leaving scope for further inquiry. At the conclusion of the evidence, the patient's lawyer has an opportunity to sum up and make representations. All of the participants are then thanked before they exit, leaving the Board to deliberate and formulate its recommendations for report to the Lieutenant-Governor.

Proceedings before the review panels are much less regular. Of the three chairmen observed, two began by calling upon the responsible physician for a statement of his medical opinion.[126] Beyond this, they were flexible as to the sequence of presentation of the evidence, permitting interruption and digression--an indulgence entered upon under guise of informality. The disruption caused by this uneven pursuit of the plan of procedure conveyed to the patient by the chairman at the outset did not conduce to clarity of process, nor to a thorough canvassing of the evidence. The third chairman heard from the patient first, in the absence of the physician. He then heard from the physician in the absence of the patient or of any representative appointed to act on his behalf, and the panel proceeded from there to decision without giving the patient any further chance to comment or reply. The flagrant disregard of the Act thereby exhibited is disturbing in the extreme for, as the reader will recall, the patient and his representative "have the right to be personally present during the presentation of any evidence to the review panel" subject only to the exclusion of the patient for health reasons in which event "the review panel shall appoint a person to act on his behalf if he does not already have a representative."[127]

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[125] No patient was excluded while the writer watched.

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[126] The physician might open by recommending that the patient be excluded during the medical evidence, in which event the panel addressed this issue at once. One legal counsel, who had agreed to the exclusion of his client during the physician's testimony, later retaliated by seeking the physician's exclusion during the patient's testimony, successfully invoking the maxim "turn about is fair play!"

[127] ACT 1972, supra ch. I note 1, s. 40(2).

But this was not the only panel to display lax practices. In general, the degree of clarity otherwise achieved by the physical setting, opening explanations, and order of procedure is severely marred by the casual acceptance of the physician's presence in the room alone with the panel both prior to a hearing and during the deliberations which succeed it, and by the frequent, unchecked tendering of medical evidence in these circumstances. We wrestle with the implications of this practice in the context of bias.[128]

Our final remarks about conduct pertain to the inquisitorial quality of the proceedings. In order better to get at the truth during the course of the hearing, the panel customarily spends some time beforehand acquainting itself with the patient's history. This briefing may take place on a case by case basis during the interval immediately preceding each hearing, or the panel may reserve an hour or two at the commencement of a sitting to go over the histories of all the applicants of the day. The chairman holds the documentation which he peruses outloud for the benefit of the other members. His file includes the patient's medical record, the detaining certificates which outline the facts upon which the medical opinion is based distinguishing those observed by the issuing physician or therapist from those communicated to him by others,[129] and the application of the patient, or a person on his behalf, for their cancellation.[130] It may also include a recent statement of the responsible physician.

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[128] See pp. 197-204 infra.

Moreover, the panel takes an active part in the hearing, eliciting much evidence by questioning the witnesses. It is prone to be most active where the patient is unrepresented, as he usually is, for the patient himself is seldom prepared with forthright statements of fact and argument in support of the cancellation of the admission or renewal certificates. Instead, his testimony consists primarily of his response to questioning by panel members, and in particular by the medical members who sometimes resort to psychiatric examining techniques to assist them in arriving at their own independent medical assessments. Nor is the patient ordinarily able to conduct an effective cross-examination of other witnesses.[131]

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[129] Alta. Reg. 119/73, ss. 8, 9, Forms 2, 3. One author has expressed dissatisfaction with the manner in which these forms are often completed. See supra ch. IV note 214.

[130] Alta. Reg. 119/73, s. 11, Form 5.

[131] In this respect, the patient is not unlike the tenants, Mr. and Mrs. Smith or Mr. and Mrs. Brown, whom Lord Goddard, C.J. described in Rex v. Brighton and Area Rent Tribunal, Ex parte Marine Parade Estates (1936), Ld., [1950] 2 K.B. 410, 420, and by reason of whose lack of sophistication a tribunal was created to serve in the place of a court of law:

> Mr. and Mrs. Smith or Mr. and Mrs. Brown, when they want their rent reduced, cannot be expected to have the services of expert witnesses at their disposal: if they go before a tribunal, all that they can say is that they think they are paying

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Once again, the inquisitorial tactics adopted by the Board of Review are exemplary. In hearings before that Board the chairman and other members, in turn, open the evidence by directing inquiries to the responsible physician--the first witness heard from. Cross-examination by the patient's counsel ensues. The same sequence of inquiry is next repeated with the patient as object, after which the counsel is allowed to introduce witnesses for the patient. The chairman then invites comments from any relatives in attendance, and he, the Board and the patient's counsel may question them. By consistently employing this approach, the Board is able to control the introduction of evidence and ensure that important information is not overlooked.

It is evident that the review panels do not use their inquisitorial powers to full advantage. Nor do those steps taken carry the investigation as far as they might. By comparison, for example, in England the medical member of the Mental Health Review Tribunal usually visits the patient on a day before the hearing for the purpose of forming an

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[Continued from p. 166.]

> too much--probably they will say that Mrs. Sykes round the corner is paying rather less than they are. That is the sort of thing which it was intended that these tribunals should have before them. The landlord may very likely appear with expert witnesses whom Mrs. Smith and Mrs. Brown would be quite incapable of cross-examining; . . .

independent opinion of his mental condition.[132] And the documentation before the Tribunal includes a "home circumstances report" as well as a "hospital report" of similar content to the statement of the responsible physician which is sometimes before the review panel.[133] Of course, the extent of legitimate investigation is circumscribed by the scope of the inquiry--our next topic.

c. Scope of inquiry

The review panel bears the task of inquiring into the present mental condition of the patient for the purpose of determining the need for his continued detention.[134] Its discretion to dispose of the application as it pleases is restricted by the objective legal standards specified in the Act. Clearly, the panel must ascertain whether the applicant is "in a condition presenting a danger to himself or others." If he is, the panel has no choice but to refuse cancellation of the detaining certificates. If he is not, a superficial reading of the Act indicates that all fetters are removed and the panel may cancel, refuse to cancel, or cancel with conditions, according to the dictates of its own wisdom.[135]

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[132] WOOD, *supra* ch. IV note 231, at 88. The Mental Health Review Tribunal Rules, 1960, S.I. 1960 No. 1139, r. 11, instruct him to "examine the patient or take such other steps as he . . . consider[s] necessary to form an opinion of the patient's mental condition," and go on to provide that "for this purpose the patient may be seen in private and his medical records examined."

[133] The contents of the statement of the responsible authority, as these two reports together are called, are prescribed by the Mental Health Tribunal Rules, 1960. *Id.* r. 6. The "hospital report" contains basic information about the patient and the detention as well as the authority's reasons for refusing to discharge him. According to WOOD, it often consists of "a strange mixture of historical detail and more recent incident." *Supra* ch. IV note 231, at 88. The "home circumstances report," which is "prepared by the local mental welfare officer for the area in which the relative to whom the patient is most likely to return is living," must be instructive as to the facilities which would be available for the patient's aftercare. WOOD, *id.*

[134] A patient who wishes to contest the initial legality of the detention must bring proceedings by way of *habeas corpus* in the ordinary courts. *See* Draper, in 3 BARKER PROJECT, *supra* ch. II note 8, at 73.

The implications of such a reading are troubling for, as we have noted above, it ignores the other two criteria essential to certification. The writer, on the other hand, believes that the failure of any one of the three conditions precedent to the initial detention--mental disorder, dangerousness to self or others, and unsuitability for voluntary care--should bring about the mandatory release of a patient who does not wish to continue on a voluntary basis.

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[135] ACT 1972, _supra_ ch. I note 1, s. 41(2). _See_ p. 95 _supra_. The precise wording of the subsection is:

> Where the application is for the cancellation of admission certificates or renewal certificates, the review panel may
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> (a) cancel the admission certificates or renewal certificates, as the case may be, with or without conditions, where it considers that the applicant is not in a condition presenting a danger to himself or others, or
>
> (b) refuse to cancel the admission certificates or renewal certificates.

On this interpretation, the panel's discretion would be further reduced by a finding that the patient is no longer suffering from mental disorder or that he has become suitable for detention other than as a formal patient. And it should be incumbent upon the panel to inquire into the presence of these criteria.

The ascription of the correct meaning to subsection (2) of section 41 turns on the interpretation of the word "may" in the opening lines. And the writer is encouraged in her view by the law as stated in the now classic House of Lords decision in Julius v. Lord Bishop of Oxford.[136] That case established that although on its face the word "may" is plainly permissive and enabling, it might nevertheless take on compulsory force if on a reading of the word in its statutory context it can be shown that the discretionary power apparently granted is in fact coupled with a duty to do something. The factors which may point to the existence of such a duty are variously described by the Lords. A good statement of them appears in the judgment of Lord Penzance at the end of his analysis of a number of earlier authorities:

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[136] (1880), 5 A.C. 214. This case has been followed at least four times and applied on at least half a dozen occasions by Canadian courts. The Supreme Court of Canada applied it in Labour Relations Board of Saskatchewan v. The Queen in rel. F. W. Woolworth Company Limited, which judgment emphasized the point made by Lord Blackburn at 243 that "Enabling words are always compulsory where they are words to effectuate a legal right." [1956] S.C.R. 82, 87, per Locke, J. The same Court distinguished another case from Julius on the basis that no legal right was involved. Heller v. The Registrar, Vancouver Land Registration District, [1963] S.C.R. 229.

The interpretation established at common law by Julius v. Lord Bishop of Oxford has since been codified in the Interpretation Act, which directs that "[t]he expression 'shall' shall be read as imperative and the expression 'may' as permissive and empowering." R.S.A. 1970, c. 189, s. 6(3).

> In other words, the conclusion arrived at by the Courts in these cases was this--that regard being had to the subject-matter--to the position and character of the person empowered--to the general objects of the statute--and, above all, to the position and rights of the person, or class of persons, for whose benefit the power was conferred, the exercise of any discretion by the person empowered could not have been intended.[137]

By addressing Lord Penzance's factors for consideration, it can be demonstrated that, as a consequence of the provisions of the Mental Health Act, 1972, a duty devolves upon the review panel to cancel admission or renewal certificates whenever it finds one of the conditions for detention lacking. To begin with, the liberty of the subject is at stake. Secondly, the empowered "person," the review panel, is a publicly-appointed body with power to perform a judicial act following a hearing convened "for the due course and administration of justice."[138] Thirdly, the general objects of the statute are to hospitalize those mentally disordered persons who, by their refusal willingly to submit themselves to medical care, pose a risk of danger either to themselves or to others in society, that is, compulsorily to detain only those persons who fit within the admission and renewal criteria and no others. Finally, the power is "in aid of [a] private right,"[139] that being the patient's right to judicial review of his detention, and as Lord Blackburn said:

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[137] Julius, _id_. at 232.

[138] _Id_. at 235, _per_ Lord Selborne.

> . . . if the object of giving the power is to enable the donee to effectuate a right, then it is the duty of the donee of the powers to exercise the power when those who have the right call upon him so to do. And this is equally the case where the power is given by the word "may," if the object be clear.[140]

To sum up, when they are applied to the review panel, all four factors indicate that the power of cancellation is coupled with a duty to cancel upon the failure of any one of the conditions for detention.

If this interpretation is accepted, what discretion is left to the review panel? Probably none under the existing wording because, at least on a literal reading of the subsection, cancellation of the certificates of a "dangerous" patient seems to be precluded. But the review panel is peculiarly suited to predicting and making determinations within the realm of "dangerousness" for, as one psychiatrist has stated:

> The term "dangerous to himself or others" is a legal test and not a clinical entity. It does not reflect psychiatric thinking, but

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[139] Id.

[140] Id. at 243.

> represents a legal construct devised for legal purposes. The legal fact finder, not the psychiatrist, takes psychiatric data and determines whether they fulfill the requirements of the law.[141]

Although this statement is not entirely accurate in Alberta where the Legislature expressly has assigned the initial responsibility for administering the test to medical professionals, it does indicate the area most amenable to judicial consideration. The writer therefore suggests that it is here that the review panel, being a judicial body, can most usefully contribute to the adjustment of competing individual and social interests and that, once it has verified the existence of the three conditions precedent, the panel should be armed with discretion to cancel, refuse to cancel, or cancel with conditions on the basis of its assessment of the magnitude of the risk of dangerousness and severity of the predicted act or acts.

But let us return to the provisions as they now exist. If it is indeed the duty of the panel to ascertain the presence of all three criteria for detention then, in the interests of gathering all the information relevant to a right decision, it has a corresponding duty as a matter of procedure to inquire into each one. Ordinarily, however, the review panels do not isolate and address the issues with specificity. Instead, the inquiries border in a general way on the patient's mental state and anticipated behaviour.

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[141] TANAY, *supra* ch. II note 27, at 785.

The physician and the patient are usually the only witnesses and, when inquiries are directed to the point, the panel relies on them for information as to the "home" circumstances which the patient would face were he to be discharged. All in all, one is struck by the impressionistic quality of the decisions which are based on largely unenunciated, and perhaps unidentified, standards which have something to do with "the good of the patient" defined more in terms of his health than in terms of concern for the protection of his right to liberty.

What scope would a model inquiry embrace? Writing of the situation in the United States, Alan Stone suggests several "factors relevant to the stated goals of confinement" which should be, but are not investigated "[e]ven when judicial consideration is invoked."[142] If we apply these factors to Alberta, the inquiry into the mental disorder itself and the patient's suitability for none other than "formal" care should cover "the amenability of the patient to treatment, the length of time which may be therapeutic, and the ability of the available institution to treat him."[143] Secondly, the assessment of the patient's dangerousness to self should take into account "the nature of the harm which must be anticipated, its likelihood, [and] the ability of the individual to comprehend or reject or assume such danger," weighing these factors against "the considerable harms that may befall the individual because of involuntary confinement" including "stigmatization, collapse of self-esteem, separation from family and community, [and] loss of job and impairment of future employment prospects."[144] Finally, the investigation of the patient's dangerousness to others should question "the magnitude, likelihood, preventability, and likely victims of the alleged dangerous conduct."[145]

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[142] ALAN STONE, supra ch. I note 5, at 48.

[143] Id.

d. Disclosure of case for detention

One of the tenets of natural justice is that a person who is entitled to a hearing should have advance notice of the allegations against him in order that he may prepare his own case in answer. In exceptional circumstances, the divulgence of material at the hearing will be satisfactory although it may necessitate an adjournment if the person affected "cannot fairly be expected to make his reply without time for consideration."[146]

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[144] Id. While admitting that "[p]sychiatric hospitalization and diagnosis can have serious consequences upon the future of the individual subjected to such intervention," TANAY protests that "this does not in itself constitute an abuse; the prejudices of society against the mentally ill are not the creation of the psychiatric profession." Supra ch. II note 27, at 808.

[145] ALAN STONE, supra ch. I note 5, at 49.

[146] DESMITH, supra ch. III note 4, at 179.

The Mental Health Act, 1972 provides that, along with notice of the right to apply for review,[147] upon certification "the formal patient and his nearest relative shall be informed of the reason for his admission or the issuance of renewal certificates in simple language"[148] and "be given a written statement of the authority for his detention and the period thereof."[149] In the event of language difficulty, the explanation and written statement are to be "in the language spoken by the formal patient or his nearest relative."[150] One may speculate as to their content, for the Act offers no further guidance and the regulations do not specify any form. For example, "simple language" may be evasive language. A physician who disapproves of a patient's attendance during the presentation of medical evidence at a hearing on review is unlikely to level with him in private. Indeed, the explanation may be little more than an announcement that the patient is suffering from mental disorder, is dangerous, and must be detained for treatment.

At a minimum, the explanation and statement do provide some information upon which the patient and his nearest relative may base a decision to apply for review. Whether that information is sufficiently explicit to permit the patient to prepare his case in response is another question altogether. Moreover, if the patient does not apply immediately but later does so on the strength of his improved condition, the reasons proferred for his detention upon certification will be inadequate to explain his continued detention because they do not take into account the intervening changes.

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[147] See p. 156 supra.

[148] ACT 1972, supra ch. I note 1, s. 36(1)(c).

[149] Id. s. 36(1)(d)(i).

[150] Id. s. 36(3).

The decision in Re Basu and Bettschen[151] is of some assistance here. In that case, a hospital board had turned down the annual application of a physician for renewal of her appointment to its medical staff. The medical staff bylaws, which had been enacted by the board pursuant to statute, gave a person so affected "the opportunity to appear on his own behalf before the hospital board" prior to final action. A hearing was accordingly arranged, but at the hearing,

> [t]he board, although requested to do so, refused to state the reasons, if any, for the decision not to reappoint the applicant. It also indicated that in any event the applicant would not be allowed to adduce evidence, either sworn or unsworn. The position of the board was that it need only allow the applicant to state why she should be reappointed to the medical staff.[152]

The Saskatchewan Court of Appeal found that the board was entrusted with a judicial function. Its refusal to state reasons therefore constituted a denial of natural justice.

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[151] (1975), 59 D.L.R. (3d) 392 (Sask. C.A.).

[152] Id. at 397, per Hall, J.A., who gave judgment for the majority.

In the words of the judgment,

> Unless the applicant is given reasons it would be useless for her to appear before the board on her own behalf. The by-laws make it clear there is to be a "hearing." This means that at the very least the board will hear what the applicant has to say about its reasons for not reappointing her. In denying this essential information to the applicant, the board has not demonstrated the objectivity and fair play essential.[153]

The two-cornered situation of a domestic tribunal is somewhat different from the three-cornered facsimile provided by proceedings before a review panel. Prior to the hearing of the patient's application, the reasons for detention are in the possession of the responsible physician and not of the panel itself. Nevertheless, Basu supports the proposition that the patient is entitled to know the reasons, if any, for his continued detention so that he may speak to them at the hearing.

In the normal course of events, the medical evidence against the patient will be the subject of testimony at the hearing itself. The particularity of the evidence demanded varies from case to case and panel to panel, influenced by the presence of legal counsel among other factors. Occasionally, for one reason or another, the responsible physician may send another physician to fill in for him at the hearing. In the two instances observed by the writer where this occurred, the substitute doctor was poorly instructed and had not informed himself beyond a cursory examination of the medical record. He added little, if anything, to the hearing.

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[153] *Id.* at 400.

Of course, the patient must be present for the medical evidence if he is to have a fair chance of meeting it. The on-the-spot appointment by the panel of a person to represent an excluded patient will serve no purpose if that person is unfamiliar with the case, unaware of the patient's version of material facts, or out of sympathy with the patient's viewpoint. The single example of such an appointment within the writer's experience involved the review of an application for cancellation of a certificate of incapacity. In this hearing, the review panel has the task of determining whether the applicant, who may be either a formal patient or a former formal patient, is capable of managing his own estate. The evidence on the issue is primarily medical. However, a lawyer from the office of the Public Trustee, who is responsible for the administration of property under certificate, attends and gives evidence concerning the nature and size of the estate, its mode of management, any unfulfilled requests by the applicant to the Public Trustee and the reasons for their rejection. No one was more startled than the lawyer himself when the chairman named him to act during the applicant's exclusion. He sat through the medical evidence in self-conscious silence. Not once did he confer with the applicant or endeavour to speak on his behalf. The appointment smacked of pretense.

Delaying the disclosure of adverse medical evidence until the hearing itself has another drawback: the patient does not have an opportunity to prepare a rebuttal. He may seek an adjournment, but adjournment carries with it the built-in consequence of postponement of his discharge, should he succeed, for up to 21 days at the instance of the chairman alone or longer with the consent of the Minister.[154] And to the patient, time is often of the essence.

There would appear to be no authority for the obligatory disclosure of medical evidence in advance of a hearing by an administrative tribunal. The issue of disclosure by the tribunal itself came up at the hearing in the Kuzyk case.[155] The decision has some bearing on our discussion, although the immediate point was not resolved. As the reader will remember, Kuzyk and the Ontario Workmen's Compensation Board were in dispute as to the percentage permanent disability rating which should form the basis of his claim to compensation. The Board had staunchly refused to accede to Kyzyk's requests for full disclosure of the fourteen medical reports on his condition within its possession. It had cooperated to the extent of providing him with a short summary of each report, and it had offered "to set up an impartial and uncommitted medical panel from which a medical referee would be chosen to pass on the medical issue."[156] Moreover, at the hearing it had revealed that the complete medical history had been made available to the attending physician and that the doctor's decision to make disclosure to Kuzyk would be a matter falling outside the Board's jurisdiction. The latter revelation relieved the court from coming to grips with the issue whether natural justice imposed any obligation on the Board to give Kuzyk the reports before calling on him to present and conclude his case. Instead, the court was able to hold that the application for an order by way of mandamus was premature. Kuzyk could not establish that he did not have access to the medical reports until he had shown that the physician named did not have the reports or could not get them or would not disclose them.

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[154] ACT 1972, supra ch. I note 1, s. 40(5).

[155] Supra note 79.

[156] Id. at 294.

The decision suggests that a patient appearing before a review panel may bear the burden of exhausting every possible avenue to the medical evidence against him. Even if he does so, he has no assurance that the court will then assist him by ordering disclosure.

What would be a workable solution to the issue of advance disclosure of the medical case for detention? The writer is not persuaded that it is necessary for the patient to have access to the records themselves.[157] Nevertheless, he must be conversant with their essential contents so that he can identify and prepare answer to the issues which will attract the attention of the review panel. England seems to be on the right track. There, the form prescribed to satisfy rule 6 of the Mental Health Review Tribunal Rules, 1960,[158] requires the responsible authority to provide the tribunal with a "[s]tatement of reasons why [they] are not themselves willing to discharge the patient (including a report on the patient's mental condition and an account of the facilities available for care of the patient if the authority for detention were discharged)." Unless the authority expresses reservations on this head, the tribunal is bound to send a copy of the entire statement, including this part, to the patient. Furthermore, the tribunal has power to rule on an objection by the patient to the withholding of any part of the statement,[159] a ruling which one would expect to be made on the same paternalistic grounds as a decision to protect the patient from the harmful impact of the medical testimony at the hearing itself.

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[157] For a discussion of access to medical and psychiatric records, and a view running generally to the contrary, see FELCH, supra note 38.

The power of a tribunal to secure portions of the medical or other evidence from the patient in the name of his own best interests, like the power to exclude him from the hearing itself, is open to criticism because of its potential for abuse--especially where that evidence is determinative on the issue.[160] We are thus led to face the question whether the review panel is or should be under an obligation to reveal to the patient, whose interests are so very much in jeopardy, information within its possession of which he does not know and upon which the panel proposes to rely in deciding against him. Such information could include medical records or other data on the patient's file, for example, correspondence from or notes of statements by relatives, friends, or employers; or it might consist of data acquired by the tribunal, pursuant to inquiry or otherwise, outside the confines of the hearing.

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[158] S.I. 1960 No. 1139.

[159] Mental Health Review Tribunal Rules, 1960. Id. r. 13(2), which reads as follows: "The tribunal may disclose to any person any information withheld under the provisions of these Rules on terms that the information shall not be disclosed to the applicant or the patient or to any other person or be used otherwise than in connection with the application."

Speaking generally and in the context of a judicial function, deSmith asserts that

> [if] relevant evidential material is not disclosed to a party who is potentially prejudiced by it, there is prima facie a

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[160] Wary of the possibility of harm from disclosure to the patient himself, some authorities draw a distinction between disclosure to the patient and disclosure to his counsel or representative. Recognition of this distinction is inherent in subsection (2) of section 40 of the Mental Health Act, 1972: the patient's representative is always entitled to hear the medical evidence given orally at the hearing although the patient may not be. The Act, however, does not prohibit the representative from relaying the evidence to the patient should he then choose to do so. In England, a Mental Health Review Tribunal may attach such a prohibition as a condition to the disclosure of information which otherwise would be withheld. Id.

> breach of natural justice, irrespective of whether the material in question arose before, during or after the hearing.[161]

Prominent among his recital of exceptions stands a case "where disclosure of evidential material might inflict serious harm on the person directly concerned (e.g., disclosure of a distressing medical report . . .)," but even in this situation, "the person claiming to be aggrieved should . . . be adequately apprised of the case he has to answer, subject to the need for withholding details in order to protect other overriding interests."[162] Reid expresses the Canadian law with less certainty.[163]

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[161] DESMITH, supra ch. III note 4, at 179.

[162] Id. at 180.

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> The whole question of access to evidence is tied up with the question how far a tribunal may go in making inquiries on its own or outside a hearing. This is a vital question to which the answers are vague. If, by statute, a hearing is merely one means of informing a tribunal authorized to make inquiries on its own, there is little force in the argument that all its information must be revealed to interested persons. The question whether a tribunal has such authority may be settled by the governing statutes, but it rarely is. Other considerations are thus resorted to in determining the question. One of these . . . is whether the function of the tribunal is administrative or judicial. The state of being one, or the other, is not immutable. A tribunal having an ultimately administrative discretion but which is required to hold a hearing in the process may be required to act judicially in respect of the hearing and permitted to act as it may wish outside it. Does this mean that it must reveal information received from other sources during, or prior to, the hearing? What about the information received after the hearing?

[Continued on next page.]

The recent case of *Lazarov* v. *Secretary of State of Canada*,[164] which postdates Reid's text, suggests that disclosure may be required. In that case, Lazarov had applied to the Secretary of State for a certificate of citizenship. The Minister had declined to grant the application on the basis of "confidential information recently provided by the Royal Canadian Mounted Police."[165] The refusal was made without first having heard from Lazarov and notwithstanding the prior findings of the Citizenship Court that Lazarov satisfied the objective criteria set out in the Canadian Citizenship Act and was "a fit and proper person to be granted Canadian citizenship."[166] While acknowledging that the function performed by the Minister in the exercise of his discretion under the Act was plainly administrative in nature, the Federal Court of Appeal concluded that the *audi alteram partem* rule applied. As the judgment, which was rendered by Thurlowe, J., puts it:

[Continued from p. 184.]

> The courts have had to struggle with this problem and, again, while some points have emerged their general significance is uncertain. Natural justice has been called in aid but it has been held in one case that a labour relations board may make and act upon extra-curial inquiries without violating the principles of natural justice. [Footnotes omitted.]

Supra note 72, at 89.

[164] *Supra* note 46.

[165] *Id.* at 740.

[166] *Id.*

> Leaving aside any question of declining the grant of certificates to particular classes of persons on grounds of broad general policy, which as I see it, it is not necessary to consider, it seems to me that whenever the reason for contemplating refusal of an application is one that is peculiar to the particular applicant, the nature of citizenship and its importance to the individual are such that the applicant ought at least to have an opportunity of some kind and at some stage of the proceedings to dispute its existence.[167]

And again:

> . . . whenever the Minister proposes to exercise his discretion to refuse an application on the basis of facts pertaining to the particular applicant or his application and where he has not already had an opportunity in the course of the proceedings before the Citizenship Court he must be afforded a fair opportunity in one way or another of stating his position with respect to any matters which in the absence of refutation or explanation would lead to the rejection of his application.[168]

The decision stresses both the importance of the subject matter to the person affected and the demands of fairness, remarking with reference to the facts of another case that "the reasons why the law should require compliance with the principles of natural justice are at least as strong in a citizenship case as in one of a person seeking a licence to operate a gambling establishment."[169] How much stronger the reasons become when a person's liberty is at stake!

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[167] Id. at 748.

[168] Id. at 750.

[169] Id. at 749.

It is noteworthy that, according to Lazarov, the right to an opportunity to be heard does not give the applicant the right to inspect or copy the confidential documentation itself. He is nevertheless entitled to be informed of its essential contents. To quote from the judgment,

> That is not to say that a confidential report or its contents need be disclosed to [the applicant] but the pertinent allegations which if undenied or unresolved would lead to rejection of his application must . . . be made known to him to an extent sufficient to enable him to respond to them and he must have a fair opportunity to dispute or explain them.[170]

Short of the failure or refusal of a deciding authority to make disclosure, the Gooliah decision[171] indicates that the tribunal's prevention of or interference with examination directed at ascertaining the material details of confidential documentation may constitute an affront to natural justice. On the other hand, the result in that case may be attributable to the cumulative effect of the obstructive tactics adopted rather than to any single one.[172]

Turning to another point, the fact that the tribunal has within its possession the information upon which it proposes to rely may be wholly unknown to the applicant, as it was in Lazarov. Or, the applicant may be aware of its existence in the hands of the tribunal but unmindful of the tribunal's intention to attach decisive weight to its contents. Whereas the tribunal probably has a duty to make at least bare disclosure in the former instance, it is questionable whether such a duty arises in the latter. Rather, a violation of natural justice may not occur until the applicant has actively and unsuccessfully pursued the details of such information from every available source only to be refused ultimately by the tribunal itself.

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[170] Id. at 750.

[171] Supra note 78.

[172] See pp. 200-03 infra.

The distinction is suggested by the decision of the Supreme Court of Canada in Workmen's Compensation Board v. Rammell.[173] The issue there before the Board was whether or not one Rammell had drowned as the result of an accident arising out of and in the course of his employment. If he had, his widow was entitled to compensation. However, it was uncertain whether, despite warnings of rough weather, he had made the trip which ended in his death to see his family or to pick up equipment for his employer's business. The evidence of the manager and secretary of the employer supported the submission of the widow's counsel that Rammell had made the trip in the course of his duties, and that any visit to his family was incidental. The evidence of an R.C.M.P. constable and of two persons who ran an equipment repair shop in the area also supported this view. They had identified a piece of paper found on the body, but since lost, as an order form itemizing parts for a power saw. The Board, for all that, had emphasized a statement reported to have been made to one of its inspectors by an unrevealed individual which alleged that Rammell had been going to see his family, along with the fact that it had been a Saturday morning and Rammell had used his own boat.

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[173] [1962] S.C.R. 85 (B.C.).

Six members of the Supreme Court of Canada rejected the argument that the Board was in breach of a duty to disclose the evidence upon which it intended to rely, noting that the issues created by the existence of the adverse statement and the use of Rammell's boat were fully apparent at the hearing. There had been "no refusal of disclosure and no non-disclosure amounting to refusal."[174] The widow had simply failed to convince the Board that her evidence outweighed the opposing evidence.

Cartwright, J. dissented, arguing as follows: the widow had made out "a strong prima facie case;" the evidence shown in the record did not upset it; therefore, the Board's decision must have been founded on other evidence in its possession which was not disclosed during the proceedings. He concluded that although the issue of whether Rammell's death had arisen out of and in the course of his employment had been clear, the Board nevertheless had not met its duty of disclosure:

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[174] Id. at 91, per Judson, J., who delivered judgment for the majority.

> In the particular circumstances of this case it was . . . the duty of the Board to make full disclosure to the [widow] of every item of evidence on which it proposed to base its decision including the contents of all statements made to its inspector and the names of the persons from whom those statements had been obtained, and, having done so, to give [her] a fair opportunity to correct or contradict that evidence. The material indicates that it failed to perform this duty.[175]

Rammell may be good law where the applicant has full and free opportunity to prepare and present his own case. But the activities of a patient under detention for mental disorder are severely curtailed. He does not enjoy personal freedom, and he rarely has the benefit of legal counsel. Because of this, the review panel, in contrast to workmen's compensation boards and most (if not all) other administrative tribunals, has been endowed with a protective jurisdiction which it exercises in concert with its deciding power. The writer therefore submits that the dissenting views of Cartwright, J. ring truer to the spirit of review panel proceedings than does the opinion of the majority, and that, with the possible exception of cases where disclosure poses a grave risk to his health, the panel ought to accommodate the patient by fully informing him as to the prejudicial evidence in its possession which he has not met.

So ends our deliberation of the duty of the review panel to reveal specific evidence acquired from sources other than oral testimony at the hearing, for example, private investigation or the patient's record. A related issue concerns the panel's duty to disclose opinions which it holds, or inferences or presumptions which it intends to draw from evidence presented, or conduct observed, on the basis of the personal knowledge and experience of its members.

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[175] Id. at 93-94.

The use of material received from outside sources and reliance on the expertise of panel members is unquestionably proper: one of the justifications for the creation of an administrative tribunal is the acquisition and application of a specialized expertise for the purpose of resolving a particular class of dispute, and another is the attainment of objectively accurate decisions. But as one author has stated in an excellent article on disclosure of tribunal knowledge which is "capable of being attributed to specific identifiable sources" and that which is not,

> . . . although it is undesirable to impose evidentiary restrictions upon the source of the material which an administrative adjudicator may properly consider, or the purpose for which he may use relevant material within his own knowledge, it is necessary to impose effective procedural checks to guard against an adjudicator relying upon inaccurate information within his personal knowledge, or misapplying his knowledge.[176]

As to the nature of these procedural safeguards, it is enough to say of review panel proceedings that the decision should not take the applicant by surprise, and that he should be allowed a fair opportunity to rebut, qualify, explain, or distinguish the facts of his case from the general rule, assumption or misconception harboured by the adjudicator. The tribunal must also take care not to lull the applicant into a false sense of security by leaving him with the wrong impression of the weight it attaches to his evidence and arguments.

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[176] Smillie, The Problem of "Official Notice": Reliance by Administrative Tribunals on the Personal Knowledge of Their Members, PUB. L., Spring 1975, 64, 67.

e. Opportunity for reply by patient

Standing on its own, the right to disclosure of the case for detention, including the "right to be personally present during the presentation of any evidence to the review panel,"[177] is hollow indeed and the intention to confer a hollow right ought not to be imputed to the Legislature. To have body, it must be accompanied by the right of the patient to present his own case in reply. That is to say, "[i]n order to protect his interests he must also be enabled to controvert, correct or comment on other evidence or information that may be relevant to the decision."[178]

Our discussion in the foregoing section proceeded on the assumption that the patient has a correlative right (1) to make out an affirmative case against detention and

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[177] ACT 1972, *supra* ch. I note 1, s. 40(2).

[178] DESMITH, *supra* ch. III note 4, at 178-79.

(2) to contradict the case for detention. However, neither aspect of that right is fully established by the Mental Health Act, 1972. To make out an affirmative case, the patient must be able to adduce the evidence of his choice through his own testimony or that of other witnesses called by him and through the production of documents--perhaps the medical report of a psychiatrist who is unconnected with the facility; he must also have a chance to submit argument. But nowhere does the Mental Health Act, 1972 give the patient the express right to make representations on his own behalf. Rather, it provides that the panel "may invite the applicant and any other person to testify or produce evidence at the hearing."[179]

The words "may invite" are misleading in two respects. In the first place, the powers of the members of the panel are greater than that of mere invitation: as commissioners of inquiry for the purpose of hearing and considering applications for review, they may compel such testimony and production.[180] And in the second place, the words leave open the negative inference that the patient is not entitled to testify as of right nor, on a wider extension of the inference, to present his case as he wishes by introducing other witnesses or evidence. At the very least, the panel must surely hear from the patient himself, if only to enable its medical members to apply their expertise to the task of independent assessment of his mental condition.

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[179] ACT 1972, supra ch. I note 1, s. 39(2).

[180] Id. s. 22(1); The Public Inquiries Act, R.S.A. 1970, c. 296, ss. 3, 4, quoted supra ch. IV note 237.

It is likely that the explanation for the enactment of this subsection is rooted in its history, stemming as it does from the recommendations espoused by the Percy Commission[181] which emphasized the investigatory side of the tribunal's responsibilities. The 1964 Act contained similar phraseology,[182] as did its Saskatchewan forerunner.[183] Be that as it may, the provision is anomalous in the context of the existing Act and causes needless ambiguity.

The contradiction of prejudicial evidence, the second aspect of the patient's opportunity to reply, may be achieved through cross-examination, and through the introduction of counter evidence and argument. The Act specifically gives the patient "the right of cross-examination"[184] thereby allowing him to seek clarification and obtain admissions against interest out of the mouths of witnesses called by the panel itself. But, as is clear from our discussion of his right to present an affirmative case, it does not expressly secure to him the other means of contradiction. In point of practice, the right of cross-examination lies idle where the patient is excused from the hearing and his representative is ill-versed with the case.

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[181] Supra ch. II note 10. See also p. 147 & note 81 supra.

[182] ACT 1964, supra ch. IV note 142, s. 17(4).

[183] The Mental Health Act, 1961, S.S. 1961, c. 68, s. 23(4).

[184] ACT 1972, supra ch. I note 1, s. 40(3).

When read together, the review panel provisions impart the intention of the Legislature to provide for a procedurally fair hearing. We are therefore justified in invoking the principles of natural justice to fill in the gaps and expunge the incongruities. Moreover, Gooliah[185] substantiates our underlying supposition that the right to be present implies the right to be heard in reply. The Immigration Act under consideration in that case provided that "the hearing of an inquiry" should be "separate and apart from the public but in the presence of the person concerned,"[186] and the majority of the Court characterized the function of the Special Inquiry Officer as judicial. That is to say, the applicant's position was very much like that of a patient before the review panel: he had the right to be present at an inquiry in the nature of a private hearing before a tribunal entrusted with the exercise of a judicial function. The majority finding that certain behaviour on the part of the Special Inquiry Officer had interfered with the applicant's efforts to establish his case and contributed to a denial of natural justice leaves no room for doubt as to the applicant's right to be heard in reply in these circumstances. And his right to make answer includes the right to call witnesses and produce documents in evidence. Indeed, there is judicial authority in Alberta to the effect that if the patient asks the panel to enforce the attendance of witnesses whose evidence is "material to the ends of justice" and who refuse to come at the patient's request, its members must oblige him by using their powers as commissioners of inquiry.[187]

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[185] Supra note 78.

[186] Id. at 244, quoting R.S.C. 1952, c. 325, ss. 27(1), 28(1).

We have shown that compliance with the principles of natural justice necessitates the observance of a high order of procedural protection for the patient on his application for review of his detention under the Mental Health Act, 1972. But it must not be thought that the granting of those rights associated with his entitlement to be heard orally derogates from the importance of the inquisitorial process which we have already identified and endorsed. The goal remains that of a right balancing of the interests of the patient on the one hand and those of society on the other. To achieve this end, the panel requires the means of fully informing itself as to both sides of the case, means which are provided by the power of inquiry. It must be able to insist upon hearing from the patient, the responsible physician, and everyone else having evidence which is pertinent to the issue of detention and within the scope of the inquiry. And it must be able to examine relevant records and documents.

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[187] Furniture and Bedding Workers Union Local 33 v. Board of Industrial Relations (1969), 69 W.W.R. 226, 230 (Alta.), *per* Milvain, C.J.T.D.

4. Freedom from bias

In addition to entitling persons affected to be heard, characterization of the function of a tribunal as judicial obliges it to render decision free from bias either in appearance of fact. The Mental Health Act, 1972 safeguards review panels against allegations based on the appearance of bias by curtailing the eligibility of any member to sit when his family or professional relationships give rise to an apparent connection with the application and create a real likelihood of interest in the outcome.[188] But this does not render them immune from criticism on another head, that being their practice of permitting the responsible physician to join them for their pre-hearing preparations and post-hearing deliberations while excluding the patient. No matter whether the physician actually participates at these times, the appearance of bias thereby created alone violates the principles of natural justice for, as the reader will remember, it is the physician who made the initial decision adverse to the patient.

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[188] ACT 1972, supra ch. I note 1, s. 21.

Better to illustrate the extent of the physician's interest, we refer to the case of Re Alberta Securities Commission and Albrecht[189] in which the chairman of the commission took part in a review of his own decision. There, Riley, J. of the Supreme Court of Alberta impugned the review, notwithstanding the words of the statute providing for "a hearing and review by the commission" (emphasis added) which included the chairman, saying:

> I cannot find that the legislature has authorized or permitted the chairman of the securities commission to deal with the licensing application in the first instance and then sit on the hearing and review either expressly or by necessary implication. The chairman on the hearing and review knew most of the matters considered by him in making his original refusal. He can hardly be expected to exclude from his mind matters that were formerly before him, although no doubt he had an open mind and gave fair consideration to whatever evidence or argument were presented to the whole commission on review. [The chairman, by his previous decision], had already indicated his view on Albrecht's application for registration, and it would only be human for him to support his attitude before the review tribunal. . . . It was wrong that he should have taken part in its deliberations. Justice must be done but also it must manifestly be seen to be done.[190]

Certainly, the physician should not use the opportunity occasioned by his presence to influence the decision of the review panel. Moreover, a person having this degree of interest in the outcome of a proceeding should not even be present in the room while deliberations are taking place. The classic authority quashing a decision on the basis of the appearance of bias for this reason is Rex v. Sussex JJ., Ex parte McCarthy.[191] In that case, the deputy clerk, whose duty it was to take notes of the evidence and to retire with the justices to advise them on points of law, was a partner in a law firm acting for a claimant on the civil side of the case. There was no bias in fact, for the justices did not consult the clerk and he "scrupulously abstained from referring to the case,"[192] but that was not enough to save the decision. In his judgment, Lord Hewart, C.J. uttered the now famous statement that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[193] A few lines later, he added: "Nothing is to be done which creates even a suspicion that there has been improper interference with the course of justice."[194] And Lush, J., who agreed, asserted: "it is irrelevant to inquire whether the clerk did or did not give advice and influence the justices. What is objectionable is his presence at the consultation, when he is in a position which necessarily makes it impossible for him to give absolutely impartial advice."[195] The appearance of bias is still greater where a person with an interest in the outcome and no duty to be there is allowed to be present while the tribunal deliberates. Such is the situation with respect to the physician.

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[189] (1962), 38 W.W.R. 430.

[190] Id. at 433-34.

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[191] [1924] 1 K.B. 256, referred to in Albrecht, supra note 189, at 434.

[192] Id. at 257.

[193] Id. at 259.

[194] Id.

The possibility of a finding of bias in fact, or actual bias, also merits our attention here. Actual bias is the product of a mind made up. It is found where the tribunal or any one of its members brings to the hearing preconceived notions which are so strongly held that they pervert the bearer's view of the evidence and close his mind to argument, and it may be inferred from the total conduct of the proceedings. In Gooliah,[196] for example, the Manitoba Court of Appeal upheld the contention that the decision maker's "conduct of the inquiry throughout its course visibly stamp[ed] it as having been tainted with bias," though as a matter of outward form Gooliah was not "denied a hearing, or the right of examination or cross-examination, or the privilege of calling witnesses on his behalf."[197]

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[195] Id. at 260.

[196] Supra note 78.

[197] Id. at 229. The judgment of Freedman, J.A. contains a useful exposition of the two prongs of the concept of bias. Speaking of actual bias, he clarifies that "the mere possession of a tentative point of view on the case . . .

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Let us examine the conduct in question. The reader will recall that the case involved an inquiry under the Immigration Act into whether Gooliah had ceased to be in the particular class in which he was admitted as a non-immigrant. An affirmative finding meant his deportation. During the course of the inquiry Gooliah, who had entered Canada with the goal of becoming a journeyman electrician, claimed to have obtained permission from the Winnipeg Branch of the Immigration Department for a switch in his program out of the Manitoba Institute of Techology and into apprenticeship--the very change which had given cause for inquiry in the first place. The court found that the Special Inquiry Officer's investigation into this claim did not amount to "an objective search for the truth."[198] He had acted more as prosecutor than as referee in that, by virtue of the comments he had made, the witnesses he had called and the questions he had phrased, his performance "appeared to be

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when he was on the threshold of the inquiry" would not disqualify the decision-maker:

> Many a Judge, from having read the pleadings and related material in a case, finds himself in precisely that position. But he recognizes that to perform his task properly he must remain constantly in the grip of his judicial function and not yield to his preconceptions or become captive to unexamined and untested preliminary impressions.

(We have already considered the duty of an administrative tribunal to disclose such preconceptions and preliminary impressions to the patient and to allow him the opportunity of rebuttal. See pp. 191-92 supra.)

[198] Id. at 234.

an attempt to find justification or support for a point of view to which, in advance of the relevant testimony, he was already firmly committed."[199] Gooliah also argued that, because apprenticeship fell within the same section of the Immigration Act, the change he had made in his program of study did not put him in a different class from that in which he had been admitted. To make his point, he had to know whether apprenticeship was a form of vocational training which had the approval of the Minister, and this information was contained in a confidential manual of departmental instructions. The Special Inquiry Officer successfully obstructed examination in this area. At first he attempted to prevent it altogether by brushing it off as "beside the point." Then, having made his position clear, he left the decision whether or not to answer up to the Department's witness who, with this sanction, entered upon "an exercise in pure evasion."[200] The result was the suppression of relevant evidence to Gooliah's detriment. All in all, the record disclosed "a hostile attitude on the part of the Special Inquiry Officer towards the applicant"[201] or, at least, that his approach to the inquiry was coloured "to the extent that it showed some measure of prejudgment or prejudice."[202] The consequence was "an inquiry which fell below the standard of objective partiality and adherence to natural justice which the law demands and to which [Gooliah] was entitled."[203]

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[199] Id.

[200] Id. at 235, per Freedman, J.A., quoting Tritschler, C.J.Q.B. at the trial level.

[201] Id. at 236, per Freedman, J.A.

The potential for actual bias exists in relation to review panels. This point if forcefully brought home when one notes the frequency with which evidence from the responsible physician is received in the absence of the patient or of any representative acting in his place--in blatant contravention of subsection (2) of section 40 of the Act. But even short of outright breach of the Act, on occasion during her observations, the writer discerned a tendency among panelists to accept the propriety of the detention as much on the strength of faith in the machinery of the mental health system as in reliance upon tangible evidence proffered at the hearing. In one instance, the evidence of the patient and the physician, who spoke from the authority of the hospital "admissions" report, conflicted in respect of pre-detention events. Notwithstanding the patient's firsthand knowledge of the incidents involved, the panel preferred the file version which emanated from unnamed source, attributing the discrepancy to the patient's probable confusion at the time. In another instance, the physician stated that he had no great objection to cancellation of the certificates. The panel nevertheless upheld them, noting that they were nearing expiration anyway. It did so without discussing whether or not the patient was "in a condition presenting a danger to himself or others," and without mentioning the possibility of renewal certificates. At other times, the panel allowed a seeming modicum of medical evidence to override the patient's submissions.

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[202] Id. at 238, per Guy, J.A.

[203] Id. at 236, per Freedman, J.A.

Faith in the system has its place, but it is not a legitimate substitute for thorough investigation of each individual case. Panel members should take care to ensure that their evident fraternity with hospital physicians does not affect the conduct of the proceedings: they must act "judicially and impartially;" they must not conduct themselves "in a spirit of bias or partisanship."[204] Closer attention to the dictates of natural justice would eradicate many of the signals from which the writer read a danger of actual bias.

5. Decision and appeal

Subject to adjournment and ministerial extension, the review panel must "hear and consider" an application within 28 days of its receipt by the chairman[205] who has a further seven days after the decision within which to send a copy to the patient and other interested persons.[206] In other words, allowing a modest time for communication at either end of the process, the time span between application and decision may run upwards of five weeks in the ordinary course.[207] A much greater period of time may elapse in an exceptional case because not only does the chairman have power to adjourn a hearing for any period up to 21 days,[208] but also the Minister of Social Services and Community Health may extend both this period and the 28 days allowed for the hearing.[209]

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[204] *Id*. at 231.

[205] ACT 1972, *supra* ch. I note 1, s. 41(1).

The breadth of this time span is a source of some concern. As we emphasized in our defense of medical admission and renewal, to the patient--removed as he is from family, job and community, and against whom the stigma grows as the detention drags on--a prompt hearing is essential to the fair and effective protection of his interests. What is more, the very "treatment" to which he is compulsorily subjected in the meantime may impair his ability to make out his case--a point which has most force in respect of admission certificates but is not without merit at later stages of detention.

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[206] Id. s. 41(3).

[207] This is assuming that "hear and consider" means "decide." See supra ch. IV note 259. If it does not, the total time span is unrestricted.

[208] ACT 1972, supra ch. I note 1, s. 40(5). As we noted supra ch. IV note 257, the Act is not explicit as to whether the chairman's 21-day power of adjournment must be exercised within the 28-day period for hearing and considering. On a strict construction, the two subsections would have to be read this way in order to be compatible. But, if this is the interpretation intended, the power to adjourn is of little use, especially at Ponoka where the panel only meets once a month as it is. It is the practice of the chairmen to apply the power outside the 28-day period and the discussion here proceeds on the basis that they do so properly. This being so, query whether, at the expiration of the initial period of adjournment, the chairman has power to readjourn for successive periods of up to 21 days each.

[209] Id. ss. 40(5), 41(1).

The 1964 Act set out a much tighter time frame. Under its provisions, and discounting an extension by the Minister, the chairman was allotted a mere 14 days from receipt of the complaint within which to transmit the decision to the patient and others.[210] No doubt this proved unworkable, for the giving of notice of the hearing alone requires a few days, and the nearest relative, along with any other person who may be affected, needs time to schedule his own affairs so as to be available and prepare for the hearing. Nevertheless, the writer cannot escape the view that five weeks for the ordinary case is excessive.

As for exceptional cases, the powers of adjournment and further extension occupy a purposeful place. To illustrate, in one case observed the chairman adjourned to retain the panel's jurisdiction over the application of a patient who had gone absent without leave prior to the hearing. Contrast this with the dismissal of the application in another case where the patient did not appear because, according to the explanation of the responsible physician, he was trying to obtain legal representation and did not want to see the panel without it. Whereas the former patient would still be entitled to be heard upon his return, the latter patient's right to a hearing in respect of the same certificates was terminated. It is submitted that, in these circumstances, adjournment pending further investigation would have been a more appropriate disposition.

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[210] ACT 1964, supra ch. IV note 142, s. 19(1).

Adjournment should also be granted at the patient's request where he requires more time to prepare his case, or to respond to previously undisclosed evidence, or should he simply want to hold open his right to a review, at some future date, of the prevailing certificates. Indeed, the "[f]ailure to grant an adjournment, or a sufficient adjournment, may amount to a denial of natural justice."[211]

Use of the powers of adjournment and extension other than in consideration of the patient's interest ought to be, and seemingly is, sparing. For example, specious excuses for the responsible physician's failure to attend should not be condoned by ready resort to the power of adjournment.[212]

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[211] REID, supra note 72, at 214, citing Canadian authority on point.

[212] In two cases observed, the responsible physician did not appear for the meagre reason that he was at a meeting elsewhere. However, the hearings did proceed--in reliance on the medical evidence of a poorly-informed substitute doctor. See pp. 178-79 supra.

If, as in theory they could be, these powers were invoked to prevent altogether the patient's access to the panel, the patient's statutory right to judicial review would clearly be infringed, for power to adjourn does not equal power to stay. Again, the writer emphasizes the importance of time to many patients, and urges that all proceedings should proceed as expeditiously as the circumstances in each case permit.

We turn now to the decision itself. The Act specifies that it shall be "in writing."[213] However, the form of the report provided for by the regulations conveys no more than the bare result--that is, that the panel either has cancelled or has refused to cancel the certificates--together with the conditions of cancellation, if any.[214] In the event of refusal to cancel, the report is to include a statement of the right of appeal.[215] The act does not oblige the panel to give reasons for its decision,[216] nor does natural justice demand that it do so.[217] The regulations under the 1964 Act directed the giving of reasons on request, but with limitations: the panel was authorized to supply them to the complainant's legal representative but, by inference from the silence in this respect, not to the patient himself;[218] and the panel was "authorized to withold [sic] reasons for its decision from any person if it agree[d] that such disclosures would prejudice the health of the complainant or for any other special reason."[219]

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[213] ACT 1972, supra ch. I note 1, s. 41(3). Two of the panels observed followed the practice of recalling the patient on the day of the hearing to inform him orally of their decision. A written copy, of course, would follow. The third panel relied on the subsequent written notice alone to convey their decision to the patient.

[214] Alta. Reg. 119/73, s. 12, Form 6.

[215] ACT 1972, supra ch. I note 1, s. 41(4); see also id.

[216] Contrast this with the onus placed on physicians and therapists issuing certificates not only to form the opinion that the three conditions precedent to detention prevail (ACT 1972, supra ch. I note 1, ss. 21(1), 31(1)), but also to state the facts upon which the opinion is based (id. ss. 29(2)(c),(3)(c), 32(1)(c),(2)(c)).

It is unfortunate that the 1964 accommodation to the patient has been removed and, further, that the review panel has not been designated as an authority under the Administrative Procedures Act so as to compel it to furnish reasons as a matter of course.[220] Devoid of any such duty, the panel is lacking in incentive precisely to define and individually to address the issues, and the opportunity is lost to build up "a set of rational criteria"[221] upon which to determine the questions involved. Indeed, even the findings of fact underlying decisions are seldom vocalized.[222] The value of requiring reasons for findings and opinions should not be discounted. One noted American author favours their use even "when discretion is exercised without hearing." He points out that

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[217] DESMITH, supra ch. III note 4, at 171; WADE, supra ch. III note 3, at 270.

[218] Alta. Reg. 675/64, s. 21(2)(a) as am. Alta. Reg. 14/68, s. 2.

[219] Id. s. 21(2)(b). Where the patient's complaint was upheld, reasons were to be provided to the hospital superintendent, presumably on an automatic basis. Id. s. 21(2)(c).

[220] R.S.A. 1970, c. 2. See supra note 3. Section 8 of that Act reads as follows:

> Where an authority exercises a statutory power so as to adversely affect the rights of a party, the authority shall furnish to each party a written statement of its decision setting out
>
> (a) the findings of fact upon which it based its decision, and
>
> (b) the reasons for the decision.

> . . . findings and opinions tend to protect against careless or hasty action, help assure that the main facts and ideas have been considered, make easier the supervision of the officer by a higher officer, and help parties to decide whether or not to seek administrative or judicial review.[223]

Once rendered, a decision in the patient's favour is binding on the board of the facility.[224] On the other hand, the patient--and he alone--may appeal a decision refusing to cancel the certificates to the Supreme Court.[225] The appeal

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[221] WADDAMS, supra ch. IV note 210, at 302.

[222] Admittedly, the one cancellation granted during the writer's observations was voiced to be because the patient was no longer dangerous. However, in another case cancellation was refused notwithstanding the responsible physician's own pronouncement that the patient's condition was not dangerous and absent the expression of any conflicting opinion by the medical members of the panel.

[223] K. C. DAVIS, DISCRETIONARY JUSTICE, A PRELIMINARY INQUIRY 104 (1969).

[224] ACT 1972, supra ch. I note 1, ss. 41(6), 48(1).

[225] Id. ss. 41(4), 46(1). He must do so within 14 days of the decision which, allowing seven days for the chairman

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is by way of a rehearing on the merits during the course of which the Court may direct the giving of evidence further to any adduced before it, and the submission of any transcript or minutes taken by the review panel at the original hearing.[226]

What of the effectiveness of the appeal provision? Only three have been launched since the inception of the 1972 Act. Two were subsequently withdrawn. The patient's lawyer in one of these cases suggested privately his fear that an adverse decision at this level would tend to hamper his client's chances of future release by a lesser authority (either administratively by the board of the facility or judicially by the review panel)--a risk he was not prepared to advise his client to take. The third case, which is before the Court now, has been adjourned sine die with the consent of counsel pending the taking of steps to locate more suitable accommodation for the applicant in view of his partial physical paralysis. In the opinion of both counsel and of the presiding judge, the problem is one of facility,

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to send out a copy of the decision to the patient plus time in the mail, does not leave the patient much time to act. See supra ch. IV note 262.

[226] Id. s. 41(5) as am. S.A. 1975(2), c. 65, s. 7. Although the Act directs the Minister to provide each review panel with "such secretarial, legal, consultative or other assistance . . . as may be required," it is not the practice of the review panels to maintain a record of any substance. Id. s. 22(2). Nor does natural justice require that a transcript be kept. DESMITH, supra ch. III note 4, at 171.

there being no issue as to the applicant's mental order. One wonders on what basis the review panel justified its decision refusing cancellation!

Because of its de novo nature, an appeal which grants the patient "a full measure of natural justice" may render "nugatory any alleged earlier failure to accord him such natural justice."[227] But, although a fair hearing on appeal may cure an earlier defect in procedure, it does not excuse it. Provided that a court can be persuaded to grant one or another of the discretionary remedies offered by way of judicial review of the proceedings before the review panel notwithstanding the existence of a right of appeal, the prerogative writs have a contribution to make here.[228]

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[227] King v. University of Saskatchewan, [1969] S.C.R. 678, 689, per Spence, J., applying Posluns v. Toronto Stock Exchange, [1968] S.C.R. 330.

[228] The availability of the prerogative remedies when a right of appeal is given by statute has been the subject of judicial controversy. The issue arises most often in connection with the writ of certiorari and it is likely that this remedy is barred where the appeal serves the same purpose. However, in "exceptional" circumstances where the granting of the discretionary remedy would not circumvent the intention of the Legislature, it may be allowed. That is to say, the existence and nature of the right of appeal are factors for the court to take into account in deciding whether or not to exercise its discretion in favour of the applicant. See, e.g., Stark v. College of Physicians and Surgeons (1965), 55 W.W.R. 121 (Sask. C.A.); Re Legal Profession Act (1967), 60 W.W.R. 705 (Alta. C.A.); Canadian Industries Limited v. Development Appeal Board (1969), 71 W.W.R. 635 (Alta. C.A.); Re Chad Investments Ltd. and Longson (1971), 20 D.L.R. (3d) 627 (Alta. C.A.); Re McGavin Toastmaster Ltd. and Powlowski (1973), 37 D.L.R. (3d) 100 (Man. C.A.). Whatever the case after the decision of the administrative tribunal has been rendered, there is good reason for [Continued on next page.]

Indeed, the problem discerned by the patient's lawyer in respect of appeal could be avoided by resorting, at an earlier stage, to a prerogative remedy such as prohibition or mandamus which would leave jurisdiction to decide on the merits with the review panel. On the other hand, a patient may hesitate to seek judicial review by a court because of the inevitable delay posed by adding intermediary steps. Viewed from a practical stance, neither recourse--appeal or judicial review--is available to a patient except where he has legal counsel, and he rarely does.

This completes our examination of the application of the principles of natural justice to proceedings before the review panel. We reserve to our final Chapter the drawing of conclusions based on the analysis in this and earlier Chapters.

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a court to grant a discretionary remedy applied for at an earlier stage in the proceedings when the time and expense of appeal by way of a rehearing on the merits may thereby be avoided.

CHAPTER VI

CONCLUSIONS AND RECOMMENDATIONS

Throughout distant and recent history, the involuntary incarceration of persons suffering from mental disorder has been sanctioned by society. And, as long as the notion of the existence of a severe disabling disease which may be termed "mental disorder" prevails, the practice of compulsorily hospitalizing such persons when they fail because of the impairment wrought by the disease to recognize their need for medical care is likely to continue to receive widespread social approval.

That is not to suggest that the situation is stagnant. The years have witnessed changes in the primary justification for detention for mental disorder--away from emphasis on the concern of society to protect itself from its dangerous members and toward emphasis on its concern for the health and welfare of each and every member. They have also seen medical advancements which permit a philosophy of voluntary treatment within the community to replace the older concept of care in a total institution far removed from the mainstream of society. As well, they have experienced the results of varying divisions of responsibilities among the components of the mental health and legal systems for right decision as to when compulsory detention is and is not required.

Nevertheless, complaints of wrongful detention occur--a fact which points up the importance of constant reevaluation of the grounds for and objectives of detention, and the need for continual reassessment of the machinery invoked to ensure the fair adjustment of conflicting individual and social interests on a case by case basis. We must constantly beware of the lurking risk that such incarcerations may have little to do with the safety of society or with the welfare of the affected person, that what we justify as best for the patient is in truth simply easier for the rest of us. Vociferous critics such as Szasz and his followers make a very real contribution to the ultimate honesty of the system: by challenging the very concept upon which detention is founded, by questioning the amenability of a "disease" called "mental disorder" to scientific diagnosis, by suggesting instead that "mental disorder" is no more than a sophisticated rationalization to which society resorts to deal with social deviancy, they call upon society to examine its true motives and justification for the detention of persons suffering from mental disorder.

In spite of the vagueness of its definition, this thesis is based on the belief that "mental disorder" exists. It is also based on the persuasion that, carefully controlled and properly applied, compulsory detention constitutes a defensible step in the pursuit of legitimate humanitarian objectives, to wit, the care, improvement and, hopefully, cure of the debilitating mental condition. Working from these premises, the writer has contended that the scheme for collaboration between the mental health and legal systems laid down by the Mental Health Act, 1972 possesses the theoretical potential for the fair resolution of individual cases. Although the fundamental right of personal liberty is involved, there are good policy reasons for entrusting the initial decision to detain for mental disorder to medical authority, thereby delaying the imposition of judicial machinery. These include recognition of the medical exigencies to be served by the confluent process, for the legal system, which like the mental health system is an instrument--albeit a major one--of an even grander social system, does not enjoy a monopoly over the decision. They also entail taking cognizance of the tendency, in large measure born out by experience prior to 1965, for a mandatory judicial hearing prior to every detention to become perfunctory and ineffective. In contrast, the reservation of hearings to subsequent applications should conduce to meaningful judicial review of earnestly controverted decisions. Moreover, the prospect of such hearings should have a salutary effect on the exercise of medical judgment in respect of detention, as well as help to reassure the patient as to the fairness of the process.

The review panel itself is unquestionably more than an additional piece of machinery in a mental health system built around a medical model. It is an adjunct of the machinery of justice adapted to fit the special considerations pertaining to detention for mental disorder--witness the intention of the Legislature, as manifest through the provisions of the Mental Health Act, 1972, that the members and hence the panel should be independent from the mental health system.[1] Then, too, its performance of a judicial function through the application of an inquisitorial process dually protects the patient's interest in his personal freedom: the inquisitorial process by reason of the paternalistic duty it places on the panel to gather in all the evidence which will enable it to decide correctly in circumstances which severely inhibit the patient's capacity fully to prepare and make out his own case (his alleged mental condition and his medication or other treatment, perhaps, and his confinement, certainly); and the judicial function by reason of the natural justice safeguards which fortify it.

The theory of medical admission followed by the opportunity for judicial review is sound. However, our analysis has revealed that its execution at the review stage is faulty. That is to say, the review panels which were created to bear the judicial load are not fulfilling their role in accordance with the direction and spirit of the Act. We have uncovered numerous shortcomings in their conduct, shortcomings which may stem in part from the failure of at least some members to appreciate the judicial quality of their function. (One member winced at the writer's use of the word "judicial;" he comprehended the panel's purpose to be "to give the doctors a little help.") We have referred to the inconsistent and confusing order in which evidence is received; the gross infraction frequently permitted of the patient's right to be present or represented during the presentation of evidence; the superficial acceptance of the medical view espoused by the facility in lieu of full investigation into the patient's claims as required for satisfaction of the panel's inquisitorial duty; the general inattention to the principles of natural justice; and the failure to identify, address and apply the criteria which fetter the panel's decision-making discretion.

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[1] ACT 1972, _supra_ ch. I note 1, s. 21.

In addition, we have made some specific recommendations with a view to improving the harmony between the inquisitorial process and the procedures invoked to protect the patient's liberty. We have said that the Act should expressly provide: (1) that the panel has a duty fully to investigate all the facts of the case; (2) that the failure of any one of the three conditions precedent to detention--mental disorder, dangerousness to self or others, and unsuitability for continuation at the facility other than as a formal patient--compels release; (3) that, notwithstanding the coexistence of the three prerequisite conditions, the panel has discretion to cancel the certificates where, in its opinion, the risk of dangerousness is not so great as to warrant the detention; (4) that the patient (or his representative) is entitled to receive a summary of the contents of the medical records and of the rest of the case against him in advance of the hearing; (5) that the panel has a duty to disclose evidence upon which it intends to rely so as not to take the patient by surprise; (6) that the patient has the right to make out his own case against detention and to contradict the case for detention; (7) that the panel shall proceed promptly upon receipt of an application unless there are extenuating circumstances (28 days is too long for the ordinary case); (8) that the chairman's power of adjournment clearly extends beyond the ordinary time for hearing and deciding; and (9) that the panel shall give reasons for its decisions. We have also adverted to two further proposals which deserve consideration. The first is that a medical member of the panel conduct an independent medical examination of the patient prior to the hearing. The second is that reasons for decision (without names and other uniquely personal identifying features) be published for the purpose of building up a body of law to which mental health personnel issuing certificates, facility boards contemplating discharge, and patients seeking review may turn for guidance.

Lastly, we have injected suggestions for procedural improvements relating to practices less readily corrected by legislative change: the orderly taking of evidence; more extensive use of inquisitorial powers to gather data and to elicit the testimony of witnesses at the hearing; broader inquiry into those factors pertinent to the conditions of detention; and the taking of strict precautions to ward off bias in appearance and fact.

The fundamental question that we have not yet tackled is: what oversight in the legislative regulation of the process for detention permits such remissness by the review panels in the performance of their duties? The writer submits that the problem revolves around the privacy of the proceedings coupled with the panel's lack of direct accountability to any external authority: no one except the patient or his representative has any right to attend except with the prior consent of the chairman and, beyond receiving the applications and notifying the participants of its decision, the panel is under no obligation to keep records of its proceedings or to report the results.[2]

One chairman displayed particular antipathy toward the presence of any extraneous persons, including relatives and friends, at review panel hearings. He justified his reluctance to open up the proceedings to outside observation in terms of concern for the patient's privacy. The permission which, after persistent efforts, the writer eventually obtained from him was couched in the warning that she may be excluded from many of the hearings by reason of the patient's objection. As stated previously, no such objections materialized.

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[2] Although the provincial ombudsman may have jurisdiction to investigate individual complaints after the right to appeal has been exhausted or expired, he does not possess on-going regulatory or supervisory power. See The Ombudsman Act, R.S.A. 1970, c. 268, ss. 11, 12.

Surely such resistance to legitimate observation is misconceived. As the Percy Commission itself asserted:

> Publicity or the possibility of public report is a strong safeguard against abuse of compulsory powers, and when it is not detrimental to the proper interests of the patient and of other people it is to be welcomed.[3]

One would expect an honestly reflective and conscientious panel to encourage observation for bona fide purposes and to seek out the constructive comments as to its practices which trained outsiders may contribute. An attitude of extreme concealment only serves to raise negative suspicions. What is more, the number of irregularities which transpired during the few hearings witnessed by the writer indicate that the degree of privacy allowed to the review panels is deleterious to the conduct of the proceedings and detrimental to the patient's interests.

That is not to suggest that all hearings before review panels should be opened up to the general public. Indeed, a public hearing is not a requirement of natural justice: "Courts are not obliged always to sit in public; there is no rule of natural justice requiring other adjudicating bodies to sit in public."[4] Nevertheless, some form of check or control should be imposed on review panels. England has come up with a twofold solution to the problem. First of all, the patient may request a formal hearing in public, a request which presumably will be granted where "the tribunal are satisfied that a hearing in public would not be detrimental to the interests of the patient and would not for any other reason be undesirable."[5] And secondly, Mental Health Review Tribunals are subject to the superintendence of the Council on Tribunals,[6] a permanent advisory body which acts as a watchdog over the organization and procedure of administrative tribunals.[7] Like measures should be introduced in Alberta.

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[3] PERCY COMMISSION REPORT, supra ch. II note 10, at 151.

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[4] DESMITH, supra ch. III note 4, at 171. This is so, notwithstanding that "due process" at the common law was administered in a public trial by peers. JENNINGS, supra ch. III note 6, at 28-29. Furthermore, as we have seen, the writ *de idiota inquirendo* gave rise to a public inquisition. *See* p. 41 *supra*.

[5] The Mental Health Review Tribunal Rules, 1960, S.I. 1960 No. 1139, r. 24(1). This conforms with the recommendation of the Percy Commission:

> If the patient or his relatives and friends so wish, the tribunal should arrange for them and the hospital or local authority staff to be present at the same time for a hearing on more formal lines. Such hearings should normally be held in private. But if the patient or a patient's relative who has referred the case to the tribunal asks that statements made by him or on his behalf and by the hospital or local health authority staff should be made in public, the chairman of the tribunal should have discretion to agree.

PERCY COMMISSION REPORT, *supra* ch. II note 10, at 151.

[6] The Schedule to the Tribunals and Inquiries Act 1958 has effect as if Mental Health Review Tribunals were specified in it. S.I. 1960 No. 810.

Another innovation which may be predicted to have a beneficial effect on the procedures of review panels is guaranteed legal representation for all patients appearing before it. Although the Mental Health Act, 1972 clearly permits representation at the hearing,[8] it makes no specific provision for legal counsel. The representative contemplated might be the patient's nearest relative, or a friend, or anyone else nominated by the patient who is willing to act on his behalf. Standing alone as it does, the right to representation is barren, for confinement curtails the patient's channels of inquiry and inhibits his chances of securing independent advice.[9] Of the twelve hearings observed by the writer, legal counsel appeared for the patient in only two, and the patient's nearest relative, her husband, assisted in a third.[10] Nor can the nearest relative invariably be relied on to help. That relative may be unconcerned, as for example an estranged spouse, or he may actively oppose release because it will transfer back to him the burden of care and worries of which he was relieved by the patient's hospitalization.

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[7] *See* WADE, *supra* ch. III note 3, at 266-68.

[8] ACT 1972, *supra* ch. I note 1, s. 40(2),(3),(4).

[9] Yake has summarized a number of factors related to the patient's institutionalization which hamper him from obtaining legal counsel: distance, drugs, treatment programs, institutional conditioning, staff influences, and inaccessibility of amenities (*e.g.* telephone). *The Delivery of Legal Assistance to the "Mentally Ill,"* unpublished paper on file with the writer, at 13 (1975) [hereinafter cited as YAKE].

The situation is somewhat but not greatly improved from that lamented in 1927 by the then Chief Justice of the Trial Division of the Supreme Court of Alberta in a "complaint of negligence" brought against the magistrate who had conducted, and the physician who had testified at the inquiry preceding the plaintiff's allegedly improper committal to an insane asylum:

> Another important feature of the case is one which may not, after all, affect the defendant and might possibly be charged to The Mental Diseases Act itself, R.S.A. 1922, ch. 223, and it is this, that no one appeared on her [the plaintiff's] behalf. In other words it was an ex-parte inquiry and in my opinion when the liberty of a subject is at stake that is a very unfortunate proceeding but apparently the Act does not provide for the unfortunate person who is brought up in this way, being represented. In my opinion that is a very important matter and I think it is very unfortunate that cases such as this should be allowed to proceed without the

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[10] The record of representation in the six certificate of incapacity hearings incidentally taken in was worse: a friend appeared in one case and no applicant had legal counsel. Not all of these persons were hospitalized, a fact which suggests that forces beyond the confinement itself influence the affected person's desire and ability to obtain representation.

> party most interested being represented either by counsel or by a next friend.[11]

That is to say, by and large, a patient who wishes to obtain personal legal representation must call upon his own resourcefulness. Furthermore, unless his income is sufficiently low to qualify him for legal aid, he must secure it at his own expense.

Taking into account the gravity of the consequences of the decision to detain and the restrictions placed on the patient by his incarceration, the case for automatic legal assistance at public expense is strong.[12] Add to this the results of studies conducted and statistics compiled in various American jurisdictions which attest to the value of legal representation as a means to release,[13] and the case is even stronger. Even in the writer's limited experience, the review panels took more care to comply with the requirements of the Act and the minimal procedural decencies when counsel appeared than when he did not, a fact which is not surprising because, unlike the average patient or lay representative, the lawyer has the wherewithal to object to deviations from acceptable procedure and to apply for judicial review or to launch an appeal. Furthermore, there is evidence of "an interesting correlation between the role assumed by patient's counsel" and "the ultimate disposition,"[14] the proportion of cases resulting in discharge being higher where counsel actively seeks his client's discharge than where he "show[s] agreement with the psychiatric recommendation of hospitalization" or makes "no clear-cut recommendation" for disposition.[15]

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[11] Hibberd v. Jamieson, [1927] 3 W.W.R. 543, 545 (Alta. S.C.), per Simmons, C.J.T.D.

[12] WADDAMS, who holds the same view, says:

> Independent legal and psychiatric counsel should be provided, at public cost if necessary. This would prevent the tribunal from being turned into a rubber stamp for medical opinion. It is true that this would be expensive, but . . . a considerable expense is surely justified where the liberty of the subject is in question.

Supra ch. IV note 210, at 302.

[13] See, e.g., BRUNETTI, supra ch. V note 32, at 710, citing Wenger & Fletcher, The Effect of Legal Counsel on Admissions to a State Mental Hospital: A Confrontation of Professions, 10 J. HEALTH & SOCIAL BEHAVIOR 66, 69 (1969), in support of the statement that a "1969 study of commitment at a mid-western hospital revealed that a higher percentage of patients were discharged when counsel was present [Continued on next page.]

How might such legal representation be delivered? The simplest answer would be to supply a duty counsel or, better yet, a counsel-for-the-day to attend each review

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[Continued from p. 225.]
than when the patient was unrepresented." See also GUPTA, who concludes from an analysis of the court records for fifty-five cases "that intervention by counsel acting as patient's attorney tremendously increases chances of discharge, not to mention the other alternatives to hospitalization that may also be worked out to the patient's satisfaction." Supra ch. V note 22, at 438.

[14] GUPTA, id. at 437.

[15] Id. at 438.

panel session.[16] Going a step further, individual representation for each patient could be provided from among members of the bar at large. Both of these solutions, however, suffer from the drawback that lawyers who are unfamiliar with the mental health system tend to lack an adequate conceptualization of their role in detention proceedings. One author offers the following reasons for the sense of "rolelessness" felt by counsel acting in the civil commitment process: "difficulty identifying with the client and clarifying a notion of loyalty;" absence of communication between the lawyer and his client and therefore failure "to know the goal desired by the client;" no guage by which to measure performance, for "[i]n a commitment case success need not be defined exclusively in terms of freeing the . . . patient;" "absence of an opponent;" and "mutual expectations of perfunctory performance" from all "the formal participants" (judge, lawyer, psychiatrist, patient).[17] Many of these obstacles could, of course, be removed by prescribing "explicit statutory duties."[18] Such duties might embrace the obligations to:

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[16] For criticisms of the effectiveness of this solution, see COHEN, supra ch. V note 36; LITWACK, supra ch. V note 34, at 817; BRUNETTI, supra ch. V note 32, at 709.

[17] COHEN, supra ch. V note 36, at 447, 448, 451.

[18] Id. at 458.

> (1) explain the nature of the proceedings to the client and interview him to ascertain what action he wishes to take; (2) undertake a factual investigation of the client's background and the circumstances of the case, including interviews with . . . the examining physician(s) and family members, and examination of hospital records; (3) demand a [public hearing], if available, after consultation with the client; (4) speak on behalf of the client who may be illiterate, inarticulate, or timid; (5) employ ordinary advocacy skills such as producing evidence, cross-examining witnesses, and guarding procedural rights; (6) investigate alternatives to commitment; (7) prepare the client for commitment if no other disposition can be agreed upon. [Footnotes omitted.][19]

The most successful answer appears to be in the development of a specialized body of patient advocates. We have already adverted to the model provided by the New York Mental Health Information Service for a scheme of this ilk,[20] and to some of its many advantages, especially where the advocates hold full-time posts.[21] Three deserve emphasis. First, the introduction of independent legal representation immediately upon detention or at an emergency and, if possible, prior to the commencement of treatment should minimize the problems inherent in delay between medical admission and judicial review. Second, by serving as mediators between the medical staff and the patient in respect of matters such as the length of detention, the program of treatment and the according of privileges, skilled patient advocates may help to reduce patient tensions which are attributable to the institutionalization and which hinder medical progress. Third, specialized advocates occupy a good position from which to endeavour to alleviate frictions between the personnel of the mental health and legal systems:[22] members of the legal profession must come to appreciate the valid concerns of the medical profession for the patient's health and, in turn, medical staff must be brought to appreciate the concern of the legal system that no person should lose his liberty without the opportunity for decision reached through judicial process.

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[19] BRUNETTI, _supra_ ch. V note 32, at 707-08. _See also id_. at 711, where he describes the legislation covering the duties of counsel for an indigent patient which is now in effect in Arizona; and COHEN, _supra_ ch. V note 36, at 452-57.

[20] _See_ p. 127 _supra_.

[21] In the opinion of LITWACK:

> Only full-time patient advocates can be expected to have the time, the expertise, the relative freedom from governmental pressures, and the sense of commitment to adequately represent clients who are likely to be poor, disturbed, and otherwise alone in defending their rights.

Supra ch. V note 34, at 839.

Having said this much, the writer strenuously urges further investigation of full-time patient advocacy systems elsewhere with a view to designing a workable plan for introduction into Alberta. The conclusions reached by Thomas R. Litwack in his article on "The Role of Counsel in Civil

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[22] The existence of such hostilities is well illustrated by the unhappy exclamation of one responsible physician upon learning that her patient would be appearing before the review panel with legal counsel: "Oh, no, he's represented! There goes the morning!"

Commitment Proceedings: Emerging Problems" merit particular attention in any such study:

> (1) Individuals subjected to civil commitment proceedings should receive adequate notice of their right to counsel. Adequate notice will generally involve oral notice delivered by someone schooled in the relevant law and committed to patients' rights. While such notice should be delivered to the client as soon after admission to a mental health facility as is practicable, it must not be delivered before the client can clearly understand it. In some cases, this will be a considerable time after admission. Also, the duty to provide notice should not be considered discharged by a single, perfunctory recitation; rather, the attorney should assume responsibility for keeping clients continually aware of their rights.
>
> (2) Counsel should have the affirmative obligation of investigating the client's case and exploring alternatives to hospitalization. Ideally, counsel would be aided in this search by ancillary investigative personnel. With the background knowledge thus obtained, counsel should discuss the case with the client's physician. Such discussion should be aimed at ascertaining the intentions of the hospital staff, the bases of any decision to commit, and the hospital staff's knowledge of any alternatives to hospitalization. Finally, counsel should negotiate with the client's physician a treatment plan mutually agreeable to the client and the hospital.
>
> (3) After negotiations with the client's physician, counsel should explain the situation to the client and present the available legal alternatives. Such a discussion should include an explanation of the hospital's plans, the likely outcome of a hearing, and counsel's view of the best course of action for the client.
>
> (4) At any hearing or trial, counsel must represent the client, and the client's wishes to the best of his or her ability. This means effectively presenting the client's case, exploring and clarifying all relevant issues, and challenging adverse psychiatric judgments.

> Obviously, this dictates an adversarial--though not necessarily hostile--stance toward parties seeking to curtail the client's liberty. Indeed, the prospect of facing articulate and challenging questioning at a hearing will encourage more thoughtful and deliberate handling of cases by psychiatrists.
>
> It hardly needs restating that such a system of effective representation almost certainly requires a staff of full-time, in-hospital, patient representatives, such as are provided by the MHIS in New York's First Judicial Department. In addition, such attorneys can best perform their duties if they have the assistance of social workers in the investigation of clients' histories, socio-economic situations, and suitabilities for various alternatives to hospitalization.[23]

Conceivably, such a service could be expanded to include advice as to problems created in consequence of the detention, and other legal needs of patients.[24] Consideration should also be given to the provision of independent medical advice at public expense.

Finally, to accompany the anticipated advent of controls to ensure their right conduct, we add a few miscellaneous proposals for extending the jurisdiction of review panels. To begin with, on occasion the patient's complaint has more to do with his treatment while detained than it does with the fact of detention. In one hearing observed by the writer, the patient asked the panel to recommend that he be given more freedom on a test basis, such freedom to include leaves of absence and perhaps enrolment in a sheltered workshop program with the object of weaning him from the hospital environment and integrating him back into the community outside. After pointing out that its recommendation would have no force of law, the panel acceded to the request. This example demonstrates the beneficial use to which review panels could put an extension of their jurisdiction to encompass objections concerning patient privileges and treatment.

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[23] LITWACK, supra ch. V note 34, at 838-39.

[24] R. JANOPAUL has suggested that part of the lawyer's task is to "help the patient with any legal problems which might arise from the hospitalization, such as guardianships, possible foreclosures on installment purchase contracts, pending legal actions, the protection of his personal property, and so on." PROBLEMS IN HOSPITALIZING THE MENTALLY ILL 13-14 (American Bar Foundation Research Memorandum Series No. 31, 1962), cited in COHEN, supra ch. V note 36, at 445-46. Moreover, YAKE has identified several areas of Alberta law in respect of which an "effective legal care delivery system" could provide useful service to mental patients. Supra note 9.

The shortage of alternative facilities poses a second recurrent difficulty, as the appeal now before the Supreme Court reveals.[25] In another case, an elderly woman who had suffered partially-disabling permanent brain damage would have been capable of managing light housekeeping for her husband and herself within the setting of a supervised senior citizens home if such accommodation could be obtained. Disheartened by their own inability and that of a social worker to locate a suitable opening, the distraught couple looked to the review panel for help. Clearly, review panels are incapable of producing facilities where none exist; nevertheless, they ought to have jurisdiction to undertake or direct that diligent investigation which will lead to the satisfactory resolution of situations such as this.

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[25] See pp. 211-12 supra.

A third problem is created by the ambiguous nature of "voluntary" hospitalization. On one of her trips to a facility, the writer accompanied a legal aid representative on visits to interview two patients who wished legal assistance to apply for review of their detention by the review panel. Technically, both were "voluntary" patients, but neither understood that he was free to leave of his own accord. This could be because the status of a voluntary patient who makes so bold as to assert his right to reject treatment may quickly be converted to that of a "formal" patient. Taking into account the considerable scope for play, by mental health professionals, back and forth between the two statuses, and bearing in mind the preceding recommendations for the expansion of review panel jurisdiction to embrace issues of treatment, privilege and alternative facility, the writer proposes that the jurisdiction of review panels should also extend to complaints by voluntary patients.

So concludes our study of the confluence of the mental health and legal systems in the process for compulsory civil commitment in Alberta. But the examination ought not to stop here, for as long as the fundamental right of personal liberty stands in jeopardy, society cannot afford to rest complacent in its search for a process which will achieve the unerringly fair adjustment of the interests of persons suffering from mental disorder with those of the populace at large.

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APPENDIX 1

SUMMARY OF LEGISLATION GOVERNING COMPULSORY CIVIL COMMITMENT IN THE NORTH WEST TERRITORIES AND ALBERTA FROM 1879 TO DATE

LEGISLATION	GROUNDS FOR DETENTION	AUTHORIZATION OF DETENTION	LENGTH OF DETENTION	PLACE OF CONFINEMENT	REVIEW OF DETENTION	GROUNDS FOR DISCHARGE	AUTHORIZATION OF DISCHARGE
1. [illegible] (1879-1906)							
An Ordinance Respecting [illegible] (Ord. No. 2 of 1879)	[illegible] (s. [illegible])	warrant of a justice of the peace (s. [illegible])	at the pleasure of the Lieutenant-Governor (s. [illegible]) or until discharged by law (s. [illegible])	gaol (s. [illegible])	Lieutenant-Governor (power to order further inquiries) (s. [illegible])		Lieutenant-Governor (s. [illegible])
An Ordinance Respecting Insane Persons (R.O. 1888, c. 7)	insane (s. 20)	warrant of a justice of the peace (s. 20)	at the pleasure of the Lieutenant-Governor (s. 20) or until discharged by law (s. 21)	gaol (s. 20)	Lieutenant-Governor (power to order further inquiries) (s. 21)		Lieutenant-Governor (s. 20)
An Ordinance Respecting Insane Persons (Cons. O. 1898, c. 80)	insane (s. 20)	warrant of a justice of the peace (s. 20)	at the pleasure of the Lieutenant-Governor (s. 20) or until discharged by law (s. 21)	gaol or other safe custody (s. [illegible])	Attorney General (power to order further inquiries) (s. [illegible])		Lieutenant-Governor (s. 20)
The Insanity Act (S.A. 1907, c. 7)	insane and dangerous to be at large (s. 4) (evidence of insanity to include that of a "duly qualified medical practitioner," s. 3(a))	warrant of a justice of the peace (s. 4)	until the order of the Attorney General for removal to an asylum (s. 4) or until discharged by law (s. 4)	gaol or the custody of any friend or relative or other safe custody (s. 4)	Attorney General (power to order further inquiries) (s. 4) or Judge of the Supreme Court of Alberta (on application of any relative or friend) (s. 10)	not insane or insane [illegible] dangerous to be at large (s. 10(2))	Attorney General (s. 8(2) as am. 1910, c. 2, s. 10.1)

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LEGISLATION	GROUNDS FOR DETENTION	AUTHORIZATION OF DETENTION	LENGTH OF DETENTION	PLACE OF CONFINEMENT	REVIEW OF DETENTION	GROUNDS FOR DISCHARGE	AUTHORIZATION OF DISCHARGE
		WARRANT OF THE ATTORNEY GENERAL (s. 8)	UNTIL DISCHARGED UNDER THE PROVISIONS OF THE ACT (s. 23)	ASYLUM (s. 8)		RESTORED TO REASON AND COMPETENT TO ACT FOR HIMSELF (s. 23a, 1911-12, c. 4)	Attorney General (s. 8(2)) or SUPERINTENDENT OF ASYLUM (s. 23a, 1911-12, c. 4)
The Mental Diseases Act (R.S.A. 1922, c. 223, as am. 1924, c. 25, s. 2)	I. Insane and dangerous to be at large (s. 5(1)) (evidence to include that of a "duly qualified medical practitioner," s. 4(1)(a))	warrant of a justice of the peace (s. 5(1))	until the order of the Attorney General for removal to a HOSPITAL (s. 5(1) as am. 1924, c. 25, s. 8) or until discharged by law (s. 5(1))	gaol or the custody of any relative or friend or other safe custody (s. 5(1))	Attorney General (power to order further inquiries) (s. 5(1)) or Judge of the Supreme Court of Alberta (on application of any relative or friend) (s. 11(1) and (2))	not insane or though insane not dangerous to be at large (s. 11(2))	Attorney General (s. 20)
		warrant of the Attorney General (s. 9)	until discharged under the provisions of the Act (s. 21)	HOSPITAL (s. 9 as am. 1924, c. 25, s. 10)			Attorney General (s. 20)
	II. VOLUNTARY SUBMISSION TO TREATMENT FOR MENTAL DISEASE (s. 2b(2), 1924, c. 25, s. 5)	SUPERINTENDENT (s. 2a(c), 1924, c. 25, s. 4) UPON BEING SATISFIED THAT A PERSON'S MENTAL CONDITION WARRANTS RECEPTION AND DETENTION (s. 2b(2), 1924, c. 25, s. 5)	until discharged under the provisions of the Act (s. 21)	hospital (s. 2b(2), 1924, c. 25, s. 5)	Judge of the Supreme Court of Alberta (on appeal taken by the patient or any friend or relative WITH THE APPROVAL AND CONSENT OF THE MINISTER OF HEALTH) (s. 11(4), 1924, c. 25, s.12(b))	not insane or though insane not dangerous to be at large (s. 11(2))	Attorney General (s. 20)
		A PATIENT WHO BECOMES INSANE AND DANGEROUS TO BE AT LARGE IS TO BE BROUGHT BEFORE A JUSTICE OF THE PEACE FOR COMMITTAL BY WARRANT (s. 2d, 1924, c. 25, s. 7)				restored to reason and competent to act for himself (s. 22(1))	superintendent (s. 2a(c), 1924, c. 25, s. 4; and s. 22(1))
	III. CERTIFICATES OF TWO LEGALLY QUALIFIED MEDICAL PRACTITIONERS THAT A PERSON SHOULD BE CONFINED IN A HOSPITAL FOR MENTAL DISEASE (s. 2b(4), 1924, c. 25, s. 5)	DIRECTION OF A JUSTICE OF THE PEACE FOR CONVEYANCE TO A HOSPITAL AND APPROVAL OF THE SUPERINTENDENT OR THE DIRECTOR OF MENTAL HEALTH (s. 2b(4), 1924, c. 25, s. 5 as am. 1933, c. 30, s. 2)	until discharged under the provisions of the Act (s. 21)	hospital (s. 2b(4), 1924, c. 25, s. 5)	Judge of the Supreme Court of Alberta (on appeal by the patient or any friend or relative with the approval of the Minister of Health) (s. 11(4), 1924, c. 25, s.12(b))	not insane or though insane not dangerous to be at large (s. 11(2))	Attorney General (s. 20)
						restored to reason and competent to act for himself (s. 22(1))	superintendent (s. 2a(c), 1924, c. 25, s. 4; and s. 22(1))
	IV. NEED FOR OBSERVATION AND INQUIRY INTO A PERSON'S MENTAL CONDITION (s. 2e, 1925, c. 46, s. 3)	ORDER OF THE MINISTER OF HEALTH (s. 2e, 1925, c. 46, s. 3)	NOT MORE THAN 30 DAYS (s. 2g, 1925, c. 46, s. 3)	hospital (s. 2e, 1925, c. 46, s. 3)	Judge of the Supreme Court of Alberta (on appeal by the patient or any friend or relative with the approval of the Minister of Health) (s. 11(4), 1924, c. 25, s. 12(b))	not insane or though insane not dangerous to be at large (s. 11(2))	Attorney General (s. 20)
						restored to reason and competent to act for himself (s. 22(1))	superintendent (s. 2a(c), 1924, c. 25, s. 4; and s. 22(1))

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LEGISLATION	GROUNDS FOR DETENTION	AUTHORIZATION OF DETENTION	LENGTH OF DETENTION	PLACE OF CONFINEMENT	REVIEW OF DETENTION	GROUNDS FOR DISCHARGE	AUTHORIZATION OF DISCHARGE
The MENTAL DISEASES Act (R.S.A. 1942, c. 192; R.S.A. 1955, c. 199)	I. MENTALLY DISEASED and dangerous to be at large (1942, s. 9(1); 1955, s. 12(1)) (evidence to include that of a duly qualified medical practitioner (1942, s. 9(1)(a); 1955, s. 12(1)(a))	warrant of a justice of the peace (1942, s. 9(1); 1955, s. 12(1))	until the order of the Attorney General for removal to a hospital (1942, s. 9(1); 1955, s. 12(1)) or until discharged by law (1942, s. 9(1); 1955, s. 12(1))	gaol OR A HOSPITAL or the custody of any relative or friend or other safe custody (1942, s. 9(1) as am. 1955, c. 38, s. 30; 1955, s. 12(1))	Attorney General (power to order further inquiries) (1942, s. 9(1); 1955, s. 12(2)(a)) or Judge of the Supreme Court of Alberta (on the application of any friend or relative) (1942, s. 15(1) and (2); 1955, s. 18(1))	not MENTALLY DISEASED OR THOUGH MENTALLY DISEASED not dangerous to be at large (1942, s. 15(2); 1955, s. 18(3))	Attorney General (1942, s. 25; 1955, s. 30)
		warrant of the Attorney General (1942, s. 13; 1955, s. 16)	until discharged under the provisions of the Act (1942, s. 24; 1955, s. 29(1))	hospital (1942, s. 13; 1955, s. 16)			Attorney General (1942, s. 25; 1955, s. 30)
	II. voluntary submission to treatment for mental disease (1942, s. 4(2); 1955, s. 5(1))	superintendent upon being satisfied that a person's mental condition warrants reception and detention (1942, s. 4(2); 1955, s. 5(1))	until discharged under the provisions of the Act (1942, s. 24; 1955, s. 29(1))	hospital (1942, s. 4(2); 1955, s. 5(1))	Judge of the Supreme Court of Alberta (on appeal taken by the patient or any friend or relative with the approval of the Minister of Health) (1942, s. 15(4); 1955, s. 19)	not mentally diseased or though mentally diseased not dangerous to be at large (1942, s. 15(2); 1955, s. 18(3))	Attorney General (1942, s. 25; 1955, s. 30)
		a patient who becomes MENTALLY DISEASED and dangerous to be at large is to be brought before a justice of the peace for committal by warrant (1942, s. 5; 1955, s. 8)				restored to reason and competent to act for himself (1942, s. 26(1); 1955, s. 31(1))	superintendent (1942, s. 26(1); 1955, s. 31(1))
	III. certificates of two legally qualified medical practitioners that a person should be confined in a hospital for mental disease (1942, s. 4(4) as am. 1956, c. 29, s. 3; 1955, s. 6(1) as am. 1956, c. 29, s. 6)	direction of a justice of the peace FOR APPREHENSION AND DETENTION, SUBJECT TO THE approval of the superintendent or the Director of Mental Health (1942, s. 4(4) as am. 1956, c. 29, s. 3; 1955, s. 6(1) as am. 1956, c. 29, s. 6)	until discharged under the provisions of the Act (1942, s. 24; 1955, s. 29(1))	hospital (1942, s. 4(4) as am. 1956, c. 29, s. 3; 1955, s. 6(1) as am. 1956, c. 29, s. 6)	Judge of the Supreme Court of Alberta (on appeal taken by the patient or any friend or relative with the approval of the Minister of Health) (1942, s. 15(4); 1955, s. 19)	not mentally diseased or though mentally diseased not dangerous to be at large (1942, s. 15(2); 1955, s. 18(3))	Attorney General (1942, s. 25; 1955, s. 30)
						restored to reason and competent to act for himself (1942, s. 26(1); 1955, s. 31(1))	superintendent (1942, s. 26(1); 1955, s. 31(1))
	IV. need for observation and inquiry into a person's mental condition (1942, s. 6; 1955, s. 9)	order of the Minister of Health (1942, s. 6; 1955, s. 9)	not more than 30 days (1942, s. 6; 1955, s. 9)	hospital (1942, s. 6; 1955, s. 9)	Judge of the Supreme Court of Alberta (on appeal taken by the patient or any friend or relative with the approval of the Minister of Health) (1942, s. 15(4); 1955, s. 19)	not mentally diseased or though mentally diseased not dangerous to be at large (1942, s. 15(2); 1955, s. 18(3))	Attorney General (1942, s. 25; 1955, s. 30)
						restored to reason and competent to act for himself (1942, s. 26(1); 1955, s. 31(1))	superintendent (1942, s. 26(1); 1955, s. 31(1))
2. MENTALLY DEFECTIVE PERSONS (1919-1942) The MENTAL DEFECTIVES Act (S.A. 1919, c. 21)	I. MENTAL DEFICIENCY FROM BIRTH, OR FROM AN EARLY AGE, SO PRONOUNCED THAT A PERSON IS INCAPABLE OF MANAGING HIMSELF OR HIS AFFAIRS (s. 2)	MINISTER OF HEALTH (on application of anyone who has a mentally defective person under his charge or control) (s. 5 as am. 1922, c. 6, s. 11(2))		INSTITUTION FOR MENTALLY DEFECTIVE PERSONS (s. 6)			

LEGISLATION	GROUNDS FOR DETENTION	AUTHORIZATION OF DETENTION	LENGTH OF DETENTION	PLACE OF CONFINEMENT	REVIEW OF DETENTION	GROUNDS FOR DISCHARGE	AUTHORIZATION OF DISCHARGE
	II. mental deficiency from birth, or from an early age, so pronounced that a person is incapable of managing himself or his affairs (s. 2)	ORDER OF A JUSTICE OF THE PEACE (s. 13), IN PROCEEDINGS INSTITUTED BY THE MINISTER OF HEALTH WHERE PARENTS, GUARDIANS, OR OTHERS HAVING CONTROL OF A MENTALLY DEFECTIVE PERSON REFUSE TO CONSENT TO HIS INSTITUTIONALIZATION (s. 7) OR WHERE THERE ARE NO SUCH PERSONS (s. 8) ↓ DISCRETIONARY ORDER OF MINISTER OF HEALTH (s. 13 as am. 1922, c. 4, s. 11(3))	UNTIL ORDER OF MINISTER OF HEALTH THAT FURTHER PROCEEDINGS BE STAYED OR THAT PERSON BE SENT TO AN INSTITUTION (s. 13 as am. 1922, c. 4, s. 11(3)) PROBATION PENDING FURTHER INVESTIGATION AND SUCH FINAL ORDER AS SEEMS PROPER UNDER THE CIRCUMSTANCES (s. 13)	CARE OF SOME RELATIVE, FRIEND OR OTHER PERSON (s. 13) ↓ Institution for mentally defective persons (s. 13)			
The Mental Defectives Act (R.S.A. 1955, c. 200)	I. IS A CONDITION OF ARRESTED OR INCOMPLETE DEVELOPMENT OF MIND EXISTING BEFORE THE AGE OF EIGHTEEN YEARS, WHETHER ARISING FROM INHERENT CAUSES OR INDUCED BY DISEASE OR INJURY (s. 2(e) as am. 1957, c. 46, s. 2)	SUPERINTENDENT (on application of anyone who has a mentally defective person under his charge or control) (s. 5 as am. 1963, c. 38, s. 4)		PROVINCIAL TRAINING SCHOOL FOR MENTAL DEFICIENCY (s. 3 as am. 1963, c. 38, s. 3) or A PRIVATE DWELLING-HOUSE (where commitment is to the charge of some person in a private dwelling-house) (s. 6 as am. 1959, c. 10, s. 3)		PROVIDED IT IS IN THE INTEREST OF THE MENTALLY DEFECTIVE PERSON AND OF THE PUBLIC → (s. 13(2) as am. 1963, c. 38, s. 5) CAPABLE OF EARNING A LIVELIHOOD AND CONFORMING TO THE LAW; AND WITHOUT POWER OF PROCREATION → (s. 11a(3)(a) as am. 1933, c. 20, s. 2(b))	PARENT OR GUARDIAN WITH CONSENT OF SUPERINTENDENT (s. 13(2) as am. 1933, c. 53, s. 5) SUPERINTENDENT (subject to recall) (s. 11a(3)(c) as am. 1933, c. 20, s. 2(b))
	II. is a condition of arrested or incomplete development of mind existing before the age of eighteen years, whether arising from inherent causes or induced by disease or injury (s. 2(e) as am. 1957, c. 46, s. 2)	order of a justice of the peace (s. 12(1)) in proceedings instituted by the Minister of Health where parents, guardians or others having control of a mentally defective person refuse to consent to his institutionalization (s. 6) or where there are no such persons (s. 8) ↓ discretionary order of Minister of Health (s. 12(1))	until order of Minister of Health that further proceedings be stayed or that person be sent to an institution (s. 12(1)) probation pending further investigation and such final order as seems proper under the circumstances (s. 12(1))	care of some relative, friend or other person (s. 12(1)) ↓ institution for mentally defective persons (s. 12(1))			ORDER OF MINISTER OF HEALTH (s. 13(3) as am. 1933, c. 12, s. 5)
The Mental Defectives Act (R.S.S. 1942, c. 191; R.S.S. 1965, c. 199)	I. is a condition of arrested or incomplete development of mind existing before the age of eighteen years, whether arising from inherent causes or induced by disease or injury (s. 2(a))	superintendent (on application of anyone who has a mentally defective person under his charge or control) (s. 5(1))		Provincial Training School for Mental Defectives (s. 3) or a private dwelling-house (where commitment is to the charge of some person in a private dwelling-house) (1942, c. 4; 1965, c. 4(2))		provided it is in the interest of the mentally defective person and of the public → (s. 13(2))	parent or guardian with consent of Superintendent (s. 13(1))

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LEGISLATION	GROUNDS FOR DETENTION	AUTHORIZATION OF DETENTION	LENGTH OF DETENTION	PLACE OF CONFINEMENT	REVIEW OF DETENTION	GROUNDS FOR DISCHARGE	AUTHORIZATION OF DISCHARGE
						capable of earning a legitimate livelihood and conforming to the law; and without power of procreation (1942, s. 14(3)(a); 1955, s. 14(4)(a))	superintendent (subject to recall) (1942, s. 14(3)(a); 1955, s. 14(4)(a))
	II. is a condition of arrested or incomplete development of mind existing before the age of eighteen years, whether arising from inherent causes or induced by disease or injury (s. 2(a))	order of a justice of the peace (s. 12(1)) in proceedings instituted by the Minister of Health where parents, guardians, or others having control of a mentally defective person refuse to consent to his institutionalization (s. 6) or where there are no such persons (s. 8)	until order of the Minister of Health that further proceedings be stayed or that person be sent to an institution (1942, s. 12(1); 1955, s. 12(2))	care of some relative, friend or other person (s. 12(1))			
		discretionary order of Minister of Health (1942, s. 12(1); 1955, s. 12(2))	probation pending further investigation and such final order as seems proper under the circumstances (1942, s. 12(1); 1955, s. 12(2) and (3))	institution for mentally defective persons (1942, s. 12(1); 1955, s. 12(2))			order of Minister of Health (s. 13(2))
3. MENTALLY DISORDERED PERSONS (1964 TO DATE) The Mental Health Act (S.A. 1964, c. 56; R.S.A. 1970, c. 231)	I. MENTAL DISORDER, NEED FOR THE CARE AND TREATMENT OR OBSERVATION PROVIDED IN A HOSPITAL, AND NOT UNWILLING TO BE ADMITTED (s. 5(1))		notwithstanding his voluntary admission, patient may be detained for 30 days on the certificate of the responsible physician or a physician designated by the superintendent and with the approval of the superintendent--as in IIIa below (s. 5(4) as am. 1970, c. 75, s. 3); in this case the superintendent has full authority to determine and direct the care and treatment to be given to the patient (s. 13(2))	hospital (s. 5(1))		NOTICE IN WRITING BY THE PATIENT OR HIS NEAREST RELATIVE TO THE SUPERINTENDENT OF THE PATIENT'S DESIRE TO BE DISCHARGED (s. 5(3)) (discharge within 72 hours or certification for 30 days, s. 5(3), and (4) as am. 1970, c. 75, s. 3)	
NOTE: except in case of emergency no diagnostic or treatment services or procedures shall be carried out except with the consent of the patient or his nearest relative or, in certain exceptional cases, as directed by the superintendent on the authorization of the Minister of Health (s. 13(1) and (1a), am. 1966, c. 54, s. 10(a))						PATIENT SUFFICIENTLY RECOVERED OR IT IS IN HIS INTEREST THAT HE BE DISCHARGED (s. 22(1))	SUPERINTENDENT (s. 22(1))
	II. mental disorder; AND NEED FOR CARE, SUPERVISION AND CONTROL FOR A PERSON'S OWN PROTECTION OR WELFARE, OR FOR THE PROTECTION OF OTHERS (s. 6(1))	CERTIFICATES OF TWO EXAMINING PHYSICIANS (sufficient authority for detention and conveyance to hospital within 14 days of examinations, or 21 days of first examination) (s. 6(1), (2) as am. 1970, c. 75, s. 4, and (7))	30 DAYS (s. 6(8) as am. 1966, c. 54, s. 4)	hospital (s. 6(1))	REVIEW PANEL (on submission of a complaint by the patient or his nearest relative or the Minister of Health) (s. 17) SUBJECT TO APPEAL TO THE SUPREME COURT (s. 21)	patient sufficient recovered or it is in his interest that he be discharged (s. 22(1))	superintendent (s. 22(1))

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LEGISLATION	GROUNDS FOR DETENTION	AUTHORIZATION OF DETENTION	LENGTH OF DETENTION	PLACE OF CONFINEMENT	REVIEW OF DETENTION	GROUNDS FOR DISCHARGE	AUTHORIZATION OF DISCHARGE
	III. mental disorder; and need PROTECTION for care, supervision and control for a person's own protection or welfare, or for the protection of others (s. 7(1))	CERTIFICATE OF ONE EXAMINING PHYSICIAN (where it appears to be impossible to obtain the certificates of two physicians within a reasonable time) (s. 7(1)) WITH THE ORAL OR WRITTEN APPROVAL OF THE SUPERINTENDENT OR ADMITTING OFFICER (sufficient authority for detention, conveyance and admission to hospital within 72 hours of the issue of the certificate) (s. 7(3) as am. 1970, c. 79, s. 3)	72 HOURS (unless patient gives notice in writing to the superintendent that he desires to remain in the hospital as a patient, or a renewal certificate is issued as in IIIa below) (s. 7(3))	hospital (s. 7(1))			
	IIIa. PATIENT IS MENTALLY DISORDERED THAT HE REQUIRES care, supervision and control for his own protection or welfare, or for the protection of others (s. 12(2) as am. 1966, c. 94, s. 9(b))	RENEWAL OF DETENTION UNDER THE CERTIFICATE OF ONE EXAMINING PHYSICIAN—as in III above—BY THE RESPONSIBLE PHYSICIAN DESIGNATED BY THE SUPERINTENDENT, and approval of the superintendent (s. 7(3) as am. 1968, c. 62, s. 4(b))	30 days (s. 7(3) as am. 1966, c. 94, s. 3)		review panel (on submission of a complaint by the patient or his nearest relative or the Minister of Health) (s. 17) subject to appeal to the Supreme Court (s. 21)	patient sufficiently recovered → or it is in his interest that he be discharged (s. 22(1))	superintendent (s. 22(1))
	IV. BELIEF OF AN INFORMANT THAT A PERSON IS mentally disordered, and in need of care, supervision and control for his own protection or welfare, or for the protection of others (s. 8(1))	WARRANT OF A JUSTICE OF THE PEACE FOR DETENTION AND MEDICAL EXAMINATION (s. 8(1))	IF TAKEN TO A HOSPITAL, 72 HOURS (unless patient gives notice in writing to the superintendent that he desires to remain in the hospital as a patient, or certificates are issued by two examining physicians) (s. 8(4) as am. 1966, c. 94, s. 6) or IF TAKEN TO SOME OTHER PLACE OF SAFE CUSTODY, IMMEDIATE MEDICAL EXAMINATION (if certificate of one examining physician is issued detention becomes in accordance with III and IIIa above) (s. 8(5), (5a) as am. 1970, c. 79, s. 6, and (6) as am. 1966, c. 94, s. 6 and 1968, c. 62, s. 5)	hospital OR OTHER PLACE OF SAFETY (s. 8(1))	review panel (on submission of a complaint by the patient or his nearest relative or the Minister of Health) (s. 17) subject to appeal to the Supreme Court (s. 21)		
	V. BELIEF OF A POLICE OFFICER THAT A PERSON IN A PLACE TO WHICH THE PUBLIC HAS ACCESS IS mentally disordered AND IS IN IMMEDIATE need of care, supervision, and control; AND THAT IT IS NECESSARY IN THE INTERESTS OF THAT PERSON OR FOR THE PROTECTION OF OTHERS TO TAKE HIM INTO CUSTODY (s. 8(3))	BELIEF OF POLICE OFFICER (sufficient authority without a warrant for detention and medical examination) (s. 8(3))	if taken to a hospital, 72 hours (unless patient gives notice in writing to the superintendent that he desires to remain in the hospital as a patient, or certificates are issued by two examining physicians) (s. 8(4) as am. 1966, c. 94, s. 6) or if taken to some other place of safe custody, immediate medical examination (if certificate of one examining physician is issued detention becomes in accordance with III and IIIa above) (s. 8(5), (5a) as am. 1970, c. 79, s. 6, and (6) as am. 1968, c. 62, s. 5)	hospital or other place of safety (s. 8(3))	review panel (on submission of a complaint by the patient or his nearest relative or the Minister of Health) (s. 17) subject to appeal to the Supreme Court (s. 21)		

LEGISLATION	GROUNDS FOR DETENTION	AUTHORIZATION OF DETENTION	LENGTH OF DETENTION	PLACE OF CONFINEMENT	REVIEW OF DETENTION	GROUNDS FOR DISCHARGE	AUTHORIZATION OF DISCHARGE
NOTE ON II-VI: the superintendent has full authority to determine and direct the care and treatment to be given to the patient (s. 13(2))	VI. PATIENT SO mentally disordered that he requires care, supervision and control for his own protection or welfare, or for the protection of others (s. 12(2) as am. 1966, c. 54, s. 9(b))	RENEWAL CERTIFICATE OF TWO RESPONSIBLE PHYSICIANS OR A PHYSICIAN DESIGNATED BY THE SUPERINTENDENT ISSUED IN RESPECT OF ANY PATIENT UNDER 60-DAY DETENTION (or in respect of a patient under temporary discharge, s. 24), and with the approval of the superintendent (s. 13(1) as am. 1966, c. 54, s. 9(a))	6 MONTHS (subject to successive renewal) (s. 13(1) as am. 1966, c. 54, s. 9(a))	hospital (s. 12(1) as am. 1966, c. 54, s. 9(a))	review panel (on submission of a complaint by the patient or his nearest relative or the Minister of Health) (s. 17) subject to appeal to the Supreme Court (s. 21)	patient sufficiently recovered or it is in his interest that he be discharged (s. 22(1))	→ superintendent (s. 22(1))
The MENTAL HEALTH Act, 1972 (S.A. 1972, c. 118)	I. PERSON SUFFERING FROM MENTAL DISORDER AND IN A CONDITION PRESENTING A DANGER TO HIMSELF OR OTHERS (s. 25)	CONVEYANCE AND EXAMINATION CERTIFICATE OF ONE THERAPIST OR PHYSICIAN ISSUED WITHIN 72 HOURS AFTER THE EXAMINATION (s. 25)	72 HOURS FOR CONVEYANCE (a physician may prescribe treatment during conveyance) (s. 26(1)) AND 24 HOURS FOR OBSERVATION, EXAMINATION, CARE, DETENTION AND CONTROL IN THE FACILITY (physician or therapist may provide treatment essential for the person's well-being) (s. 26(2))	FACILITY (i.e., a place or any part of a place so designated by the regulations, s. 1(g) as am. 1973, c. 76, s. 2) (s. 26(1))			
	II. person suffering from mental disorder, in a condition presenting a danger to himself or others, AND UNSUITABLE FOR ADMISSION OTHER THAN AS A FORMAL PATIENT (s. 29(1))	TWO ADMISSION CERTIFICATES ISSUED BY EITHER A THERAPIST AND A PHYSICIAN OR TWO PHYSICIANS AT LEAST ONE OF WHOM IS A MEMBER OF THE STAFF OF THE FACILITY (s. 29(1) and (1.1) am. 1973, c. 76, s. 5)	ONE MONTH FROM DATE OF ISSUE OF THE SECOND CERTIFICATE (s. 30(1) as am. 1973, c. 76, s. 6) (one admission certificate has the same effect and provides the same authority as a conveyance and examination certificate, s. 30(1) as am. 1975(2), c. 65, s. 3) UPON EXPIRATION OF CERTIFICATES, FORMAL PATIENT SHALL BE INFORMED THAT HE IS A VOLUNTARY PATIENT (s. 31(3))	facility (s. 30(1))	review panel (on application of formal patient or a person, including the Minister, the Director or a board on his behalf) (s. 38(1), (3) and (4)) subject to RIGHT, WITHIN 14 DAYS TO appeal decision to the Supreme Court (appeal is a rehearing of the matter on the merits) (s. 46(1) and (5) as am. 1975(2), c. 65, s. 7)	← APPLICANT NOT IN A CONDITION PRESENTING A DANGER TO HIMSELF OR OTHERS (s. 41(2)) formal patient no longer a danger to himself or others (s. 40(3) as am. 1973, c. 76, s. 13)	→ board (s. 40(3) as am. 1973, c. 76, s. 13)
	III. FORMAL PATIENT suffering from mental disorder, in a condition presenting a danger to himself or others, AND UNSUITABLE FOR CONTINUATION OTHER THAN AS A FORMAL PATIENT (s. 31(1))	TWO RENEWAL CERTIFICATES issued by either a therapist and a physician or two physicians at least one of whom is a member of the staff of the facility (s. 31(1) and (1.1) as am. 1973, c. 76, s. 7(a))	IN THE FIRST CASE FOR NOT MORE THAN TWO ADDITIONAL MONTHS, AND IN THE SECOND AND EACH SUBSEQUENT CASE FOR NOT MORE THAN SIX ADDITIONAL MONTHS (s. 31(2) as am. 1973, c. 76, s. 7(b)) upon expiration of certificates, formal patient shall be informed that he is a voluntary patient (s. 31(3))	facility (s. 31(1))	review panel (on application of formal patient or a person, including the Minister, the Director or a board on his behalf) (s. 38(1), (3) and (4)) subject to right, within 14 days, to appeal decision to the Supreme Court (appeal is a rehearing of the matter on the merits) (s. 46(1) and (5) as am. 1975(2), c. 65, s. 7)	← applicant not in a condition presenting a danger to himself or others (s. 41(2)) formal patient no longer a danger to himself or others (s. 40(3) as am. 1973, c. 76, s. 13)	→ board (s. 40(3) as am. 1973, c. 76, s. 13)
	IV. NEED FOR A PERSON TO BE EXAMINED IN THE INTERESTS OF HIS OWN SAFETY AND THE SAFETY OF OTHERS, WHERE EXAMINATION CAN BE ARRANGED IN NO OTHER WAY (s. 33(1))	ORDER OF A PROVINCIAL JUDGE FOR APPREHENSION FOR EXAMINATION (s. 33(1))	Upon apprehension person is deemed to be a person in respect of whom a conveyance and examination certificate has been issued, s. 33(3))				

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LEGISLATION	GROUNDS FOR DETENTION	AUTHORIZATION OF DETENTION	LENGTH OF DETENTION	PLACE OF CONFINEMENT	REVIEW OF DETENTION	GROUNDS FOR DISCHARGE	AUTHORIZATION OF DISCHARGE
PARTS OF I TO V: board is under a duty to provide such diagnostic and treatment services as the patient is in need of and that the staff of the facility are capable and able to provide (s. 24(1)) board shall determine what level of security is reasonably required for each patient and is under a duty to provide it and to review it at intervals of not more than six months (s. 24(2))	V. BELIEF OF A POLICE OFFICER (A) that a person is suffering from mental disorder, in a condition presenting a danger to himself or others, AND ACTING IN A MANNER THAT IN A NORMAL PERSON WOULD BE DISORDERLY; AND (B) THAT THE PERSON SHOULD BE EXAMINED in the interests of his own safety or the safety of others, AND THE CIRCUMSTANCES ARE SUCH THAT IT WOULD BE DANGEROUS TO TAKE PROCEEDINGS BEFORE A PROVINCIAL JUDGE (s. 26(1))	BELIEF OF POLICE OFFICER (s. 26(1))	Upon conveyance, person is deemed to be a person in respect of whom a conveyance and examination certificate has been issued (s. 26(2))	facility (s. 26(1))			

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APPENDIX 2

COMPARISON OF REVIEW PANELS UNDER THE MENTAL HEALTH ACT, S.A. 1964, c. 54, AND THE MENTAL HEALTH ACT, 1972, S.A. 1972, c. 118, INCLUDING AMENDMENTS THERETO AND REGULATIONS THEREUNDER

	1964	1972
1. Purpose of Review Panel		
Function	To investigate complaints alleging that a certificate or a renewal certificate should be revoked, ss. 15(8) and 17(1) as am. S.A. 1968, c. 62, s. 9	To hear and consider "applications from formal patients concerning the cancellation of admission certificates or renewal certificates," s. 19(1)(a)*
Jurisdiction		Review panel may "cancel the admission certificates or renewal certificates, as the case may be, with or without conditions, where it considers that the applicant is not in a condition presenting a danger to himself or others," or refuse to cancel them, s. 41(2)

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*Because they do not concern the deprivation of personal liberty, those provisions dealing with the cancellation of certificates as to the incapacity of a person to manage his estate have been omitted.

	1964	1972
2. Establishment of Review Panels		
Appointment	Minister of Health "shall appoint a review panel for each hospital," s. 15(1)	Minister of Social Services and Community Health "shall establish one or more review panels," s. 19(1) as am. S.A. 1975(2), c. 12, s. 8; and appoint its members, s. 19(2)
Composition	A physician, a solicitor, and one other person, s. 15(2)	A psychiatrist, a therapist or physician, a solicitor, and a person representative of the general public, s. 19(2)
Designation of chairman and vice-chairman	Minister shall designate one member to be chairman and another to be vice-chairman, s. 15(3)	Solicitor shall be chairman, s. 19(2)(c); Minister may designate a vice-chairman, s. 19(3)
Alternate members	Minister may appoint an alternate member for each member of the panel and a member who cannot act "shall be replaced by the appropriate alternate member who shall act until the investigation being conducted is completed, s. 15(4); an amendment in 1966 permitted the Minister to appoint one or more alternate members for each number, S.A. 1966, c. 54, s. 11	Minister may appoint one or more alternate members and a member who cannot act "shall be replaced by an appropriate alternate member who shall act until the hearing is complete, s. 19(3)

	1964	1972
Voting provisions	A decision of a majority is the decision of the panel, s. 15(9)	A quorum is four members or alternate members, s. 20(1); each member is "entitled to one vote, and in the event of a tie vote, the member acting as chairman has a second vote, s. 20(2); a decision of a majority is a decision of the panel, s. 20(3)
Review of appointments	Minister "may annually review the appointment of members and alternate members and make such changes as he considers advisable," s. 15(5)	Minister "may periodically review the appointment of the members and alternate members . . . and make such changes as he considers advisable, s. 20(4)
Ineligibility for membership	"No employee of the Government or of any agency of the Government or of a hospital, no person actively serving as a member of the medical staff of a hospital and no person who by blood or marriage is closely related to or connected with a member of the medical staff . . . shall be a member or alternate member of a review panel for that hospital, s. 15(6)	"No person who is actively serving as a member of the staff of a facility is eligible to sit . . . when the panel is considering an application from a formal patient" of that facility, s. 21(1); "[n]o person who is (a) related by blood or marriage to a person applying to a review panel, or (b) a psychiatrist, physician or therapist who is treating or who has treated a person applying to a review panel. or (c) a solicitor who is acting or has acted for a person applying to a review panel, is eligible" to sit for an application of that person, s. 21(2)

	1964	1972
Powers of inquiry	For the purpose of the investigation of a complaint, members "have all the powers of commissioners appointed under The Public Inquiries Act," s. 15(8)	For the purpose of hearing and considering applications in accordance with the Act and the regulations, members have "all the powers of a commissioner appointed under The Public Inquiries Act, s. 22(1)
Provision of assistance	Minister shall provide "such secretarial and other assistance" as may be required, s. 15(7); in 1970, the word "legal" was inserted after "secretarial," S.A. 1970, c. 75, s. 7	Minister shall provide "such secretarial, legal, consultative and other assistance" as may be required, s. 22(2)
Remuneration	Members "shall receive such remuneration as may be determined by the Lieutenant Governor in Council," s. 15(10)	Lieutenant Governor in Council may make regulations "prescribing the remuneration and expenses to be paid to . . . the members and alternate members of review panels," s. 60(2)(k). The current rates are set out in Reg. 244/75

3. Procedure to Obtain Review

Notification of right to apply to review panel	Forthwith upon admission or the replacement of the authority for detention by another authority or the issue of a renewal certificate, the superintendent shall notify the patient and his nearest relative of the existence and	Upon a person becoming a formal patient or the subject of renewal certificates, the patient and his nearest relative shall be informed of the reason for his detention and be given a written statement of the authority for and length

	1964	1972
	function of the review panel, the name and address of the chairman, and the right of appeal to the review panel, s. 16(1); Alta. Reg. 675/64, s. 22, Form VI, as am. Alta. Regs. 14/68, s. 3(e) and 197/68, s. 2(a)	of his detention, the function of the review panels, the name and address of the appropriate chairman, and his right to apply to the review panel for cancellation of the admission or renewal certificates, s. 36(1); "[i]n the event of language difficulty, the board shall obtain a suitable interpreter and provide the explanation and written statement . . . in the language spoken by the formal patient or his nearest relative," s. 36(3), and Alta. Reg. 119/73, s. 5
Facilitation of review	Superintendent "shall, having regard to the circumstances in each case . . . , do such other things as [he] considers expedient to facilitate the submission of a complaint" to the chairman of the review panel, s. 16(2); Alta. Reg. 675/64, s. 15 (illiterate patient)	Board "shall, having regard to the circumstances in each case . . . , do such other things as [it] considers expedient to facilitate the submission of one or more applications" to the review panel, s. 36(4); Alta. Reg. 119/73, s. 4 (illiterate patient)
Application for review		
(a) by detained person	Any person detained against his will (or in respect of whom a	"A formal patient . . . may apply to a review panel for cancellation

	1964	1972
	renewal certificate has been issued during a period of temporary discharge, s. 24(2)) "may submit a complaint in writing to the chairman of the review panel alleging that the certificate ought not to have been issued or that it should be revoked," s. 17(1), Alta. Reg. 675/64, s. 22, Form VII as am. Alta. Reg. 14/68, s. 3(f); in 1968, the words "ought not to have been issued or that it" were deleted, S.A. 1968, c. 62, s. 9	of (a) admission certificates, or (b) renewal certificates, . . . by sending notice of application to the chairman," s. 38(1); Alta. Reg. 119/73, s. 11, Form 5
(b) on behalf of detained person	Nearest relative or Minister may submit a complaint on behalf of a patient (being "a person admitted to a hospital," s. 2(f), s. 17(2))	A person may apply on behalf of the formal patient, s. 38(1); Minister, Director of Mental Health Services or board may submit an application on behalf of a formal patient, s. 38(3)
Frequency of review	Only one complaint may be made with respect to a certificate or a renewal certificate, s. 17(3)	"Only one application may be made . . . by a formal patient or a person on his behalf with respect to each two admission certificates or renewal certificates issued, but the Minister, the Director or a board may apply at any time," s. 38(4)

	1964	1972
4. Procedure on Review		
Notice of hearing	Forthwith upon receipt of a complaint, the chairman shall notify the hospital superintendent in writing, Alta. Reg. 675/64, s. 13 and s. 22, Form VIII as am. Alta. Regs. 14/68, s. 3(g) and 197/68, s. 2(b); whereupon the superintendent shall forthwith "notify the patient and the nearest relative" and send a summary statement as to the patient's past and present condition to the chairman, Alta. Reg. 675/64, s. 14 and s. 22, Form IX as am. Alta. Reg. 14/68, s. 3(f)	Upon receipt of an application the chairman shall give notice of the date, time, place and purpose of the hearing to the applicant, any person acting on his behalf, the nearest relative and "any other person that the chairman considers may be affected by the application and should be notified," s. 39(1), and "shall, where appropriate, notify the board of the facility," Alta. Reg. 119/73, s. 3(1) and s. 10, Form 4
Investigation by review panel	Upon receipt of a complaint the review panel "shall forthwith carry out whatever investigation it considers necessary to speedily determine the validity of the complaint," s. 17(4); cf. upon receipt of a statement from the superintendent, "the chairman shall convene a meeting of the panel to consider and to decide whether or not further investigation is necessary," Alta. Reg. 675/64, s. 16	"As soon as it is able to do so, the review panel shall carry out whatever investigation and hearing it considers necessary," s. 39(2)

	1964	1972
Place of hearing; availability of hospital records and information	Hospital concerned, if panel "considers that it is advisable to examine medical records, interview patients and other witnesses," Alta. Reg. 675/64, s. 17; otherwise, "the hospital records shall remain at the hospital or in the custody of a representative of the hospital, but copies . . . may be made available to the panel," Alta. Reg. 675/64, s. 18	Board shall comply, "without delay," with any request made by the chairman for "such information as he considers relevant," Alta. Reg. 119/73, s. 3(1) and (2); where hearing is not held at the facility where the formal patient is detained, his records "shall be made available to the panel," Alta. Reg. 119/73, s. 6
Admission of evidence	Review panel "may invite the complainant and other persons" affected by the complaint "to testify or produce evidence relating thereto," s. 17(4); panel may interview a complainant if it considers it advisable and "shall interview the complainant if the complainant requests an interview," Alta. Reg. 675/64, s. 19(1); "the rules of evidence do not apply," Alta. Reg. 675/64, s. 20	Review panel "may invite the applicant and any other person to testify or produce evidence at the hearing," s. 39(2)
Privacy of proceedings	All proceedings "shall be conducted in private and no member of the public is entitled to be present during any investigation, hearing or deliberations . . . except with the permission of the Minister, on the recommendation of the chairman,"	All proceedings "shall be conducted in private" and, except for the applicant and his representative, "no person has a right to be present without the prior consent of the chairman," s. 40(1)

	1964	1972
	s. 18(1); when panel interviews a complainant, "the interview may be held in private or in the presence of any person the review panel considers should be present," Alta. Reg. 675/64, s. 19(2)	
Right to be present during presentation of evidence	"[C]omplainant and his representative have the right to be personally present;" nevertheless, the complainant may be excluded if in the opinion of the review panel there may be a detriment to his health by his presence, s. 18(2)	"[A]pplicant and his representative have the right to be personally present;" nevertheless, the applicant may be excluded if in the opinion of the review panel there may be an adverse effect on his health by his presence, in which event "the review panel shall appoint a person to act on his behalf if he does not already have a representative," s. 40(2)
Right of cross-examination	Complainant or his representative has the right, s. 18(3)	Applicant or person acting on his behalf has the right, s. 40(3)
Publication of proceedings	"Except as permitted by this Act or the regulations, no person shall publish any report of an investigation . . . or the names of any persons concerned" in it, s. 18(4)	"Except as permitted by the chairman, no person shall publish any report of a hearing, investigation or deliberation by a review panel or the names of any persons concerned therewith," s. 40(4); in 1973, the words "and except where the report is published by the applicant or his representative"

	1964	
		were inserted following the word "chairman," S.A. 1973, c. 76, s. 10
Time for hearing	(See "Time for notification" of decision of review panel)	Review panel shall hear and consider an application within 28 days of its receipt by the chairman "or such longer period as the Minister allows," s. 41(1)
Power of adjournment		"[C]hairman may adjourn a hearing for any period up to 21 days (and with consent of the Minister for a longer period) for any purpose he considers necessary," s. 40(5)

5. Decision of Review Panel

Form of decision	Written report of the chairman, s. 19(1); Alta. Reg. 675/64, s. 22, Form X as am. Alta. Regs. 14/68, s. 3(h), and 197/68, s. 2(c), and then replaced by Alta. Reg. 236/71, s. 2(a)	In writing, s. 41(3); where the review panel refuses to cancel certificates, the written report shall include a statement of the right to appeal to the Supreme Court, s. 41(4); Alta. Reg. 119/73, s. 12, Form 6
Persons entitled to notice of decision	Chairman shall "transmit the report" to the complainant (or the nearest relative or Minister) with a copy	Chairman shall "send a copy of the decision" to the applicant, his nearest relative and any

	1964	1972
	to the hospital superintendent, s. 19(1); and to the complainant's legal representative, Alta. Reg. 675/64, s. 21(1)	person interested in the application, s. 41(3); (or to the Minister, Director or board where the application was made by one of these, s. 41(5))
Time for notification	Within 14 days after the receipt by the chairman of the complaint "or within such further period as may be fixed by the Minister," s. 19(1)	Within seven days of the date of decision, s. 41(3)
Reasons for decision	When panel rejects a complaint, reasons "shall be provided to the complainant's legal representative, on request," except that they may be withheld if the panel "agrees that such disclosures would prejudice the health of the complainant or for any other special reason;" when panel supports a complaint, reasons shall be provided to the superintendent, Alta. Reg. 675/64, s. 21(2) as replaced by Alta. Reg. 14/68, s. 2	
Effect of decision	Superintendent is bound to "take whatever action may be required to give effect to the decision," ss. 19(2) and 23(3)	"[B]oard of the facility in which the formal patient is detained shall take or cause to be taken whatever action may be required to give effect to the decision," ss. 41(6) and 48(1)

6. Appeal to Supreme Court

	1964	1972
Right of appeal	Complainant (or his nearest relative or the Minister on his behalf), "if dissatisfied with the decision of the review panel," may apply to the Supreme Court "for an order revoking a certificate and that the complainant be discharged from the hospital," s. 21(1)	Applicant may appeal a decision of a review panel to the Supreme Court, s. 46(1)
Time for appeal		Within 14 days of the decision of the review panel, s. 46(1)
Form of application	By originating notice of motion, s. 21(2)	By originating notice of motion, s. 46(2)
Service of notice	Notice of motion shall be served on the Minister, the superintendent, and "such other persons as the court may direct," s. 21(3)	Notice of motion shall be served on the Minister, the chairman of the board of the facility, and "such other persons as the Court may direct," s. 46(3)
Time for service	Not less than 15 days before the motion is returnable, s. 21(3)	Not less than 15 days before the motion is returnable, s. 46(3)
Applicability of rules of court	Except as otherwise provided, "the practice and procedure of the court upon an application in chambers applies, so far as it is applicable," s. 21(3)	Except as otherwise provided, "the practice and procedure of the Court pertaining to applications by originating notice of motion applies, so far as it is applicable," s. 46(3)

	1964	1972
Affidavit in support of application	"The application shall be supported by an affidavit of the applicant setting forth fully all the facts," s. 21(4)	"The application shall be supported by an affidavit of the applicant setting forth fully all the facts," s. 46(4)
Evidence to be considered	"In addition to the evidence adduced by the applicant, the court may direct such further evidence to be given as it considers necessary," s. 21(5)	"In addition to the evidence adduced by the applicant, the Court may direct such further evidence to be given as it considers necessary," s. 46(5); in 1975, this subsection was replaced by a provision that the appeal "shall be a rehearing of the matter on the merits, and in addition to any further evidence adduced by the applicant" or the Minister, "the Court may direct that any transcript or minutes taken by the review panel at the original hearing of the evidence be put in evidence on the appeal and may direct such further evidence be given as it considers necessary," S.A. 1975(2), c. 65, s. 7
No appeal	Order of the court is not subject to appeal, s. 21(6)	Order of the court is not subject to appeal, s. 46(6)
Order as to costs	In the discretion of the court, s. 21(7)	In the discretion of the court, s. 46(7)

	1964	1972
Jurisdiction		"The Court may ... (i) quash the decision and order the cancellation of the admission certificates or renewal certificates, as the case may be, or (ii) order that the review panel reconsider the applicant's application for concelation, or (iii) make such other order it considers just," s. 46(8)(a)
Effect of order	Upon being served with a true copy of the order, the superintendent is bound to comply with it, s. 21(8)	

7. Miscellaneous

	1964	1972
Power to make regulations with respect to review panels	Lieutenant Governor in Council "may make regulations with respect to the submission of complaints to review panels and matters incidental thereto and consequential thereon," s. 20	Lieutenant Governor in Council "may make regulations with respect to the submission of applications to review panels and with respect to hearings, consideration and investigations of review panels and matters incidental thereto and consequential thereon," s. 60(1)

	1964	1972
Exemption of review panel members from liability	"No action lies against any person ... (e) who is a member of a review panel for any act done in the course of his duties as a member of the panel, if he acted in good faith and with reasonable care," s. 35 as am. S.A. 1968, c. 62, s. 12(b)	

APPENDIX 3

OUTLINE OF EMPIRICAL DATA WHICH WOULD CONTRIBUTE TO STUDY OF THE OPERATION OF REVIEW PANELS

1. Social, legal and clinical characteristics of patients

Age, sex, marital status, occupation, educational level, locality of residence before hospitalization, length of stay in hospital, previous admissions, diagnosis of mental disorder, nature of treatment

2. Applications

Total number of applications made each year

Number of applications for cancellation of admission certificates, renewal certificates

Person submitting application (patient, person on his behalf, Minister, Director, board) (s. 38(1) and (3))

Form of application (is first communication with panel on prescribed form?)

Number of previous applications

3. Hearing

Persons notified (s. 39(1))

Investigative steps taken (e.g. medical examination, staff interviews, patient file study, inquiries as to after-care facilities) (s. 39(2))

Time elapsed between application and hearing (ss. 39(2) and 41(1))

Persons in attendance (e.g. relatives, medical personnel, clerical personnel)

Persons giving evidence (those supporting application, those opposing application)

Patient represented? Legal counsel? Lay person? Patient's choice or appointed for patient? (s. 40(2))

Patient present? excluded? present for part and excluded for part? On the basis of what evidence?

Use of oath, summons, etc. (s. 22(1))

Patient's opportunity to rebut adverse evidence (s. 40(3))

Duration of hearing

Patient's medication during hearing, treatment prior to hearing

4. Arguments against detention

Invalidity of detention? (s. 57)

No longer suffering from mental disorder?

No longer in a condition presenting a danger to himself or others? (s. 41(2)(a))

No longer unsuitable for admission to a facility other than as a formal patient?

5. Other complaints

(e.g. as to treatment, withdrawal of privileges, refusal of day or weekend leave)

6. Medical evidence

Report by hospital authorities? Available to patient? patient's representative? Parts excluded?

Examination by medical member of panel?

Independent medical report introduced by patient?

Use of patient records? Available to patient? patient's representative?

7. Evidence as to after-care facilities

By hospital authorities (e.g. in medical report)

By relatives

Other

8. Withdrawal of applications

Frequency

Time of withdrawal

Reasons (e.g. patient made voluntary, discharged, or one of these promised)

9. Adjournments (s. 40(5))

Frequency

Length

Reasons (e.g. more information required)

10. Decisions (s. 41(2))

Number of admission certificates cancelled

Number of renewal certificates cancelled

Number of cancellations refused

Conditions attached to cancellation

Reasons for cancellation or refusal to cancel

Reference to other complaints

Persons to whom decision sent (s. 41(3) and (5))

Requests for reasons

VITA

NAME	Margaret Ann Shone (nee Harding)
PLACE OF RESIDENCE	Edmonton, Alberta, Canada
YEAR OF BIRTH	1942

POST SECONDARY EDUCATION AND DEGREES

University of Saskatchewan, Saskatoon
Bachelor of Arts (English): 1965
Professional "A" Teaching Certificate: 1965 (issued by the Department of Education, Saskatchewan)

University of Toronto, Bachelor of Laws: 1969

University of Alberta, Master of Laws: 1976

RELATED WORK EXPERIENCE

Fenerty, McGillivray, Robertson, Prowse, Brennan, Fraser, Bell & Code, Barristers and Solicitors, Calgary, Student-at-law: 1969-70

Institute of Law Research and Reform, University of Alberta, Edmonton, Legal Research Officer 1970-74; Counsel 1974-

PROFESSIONAL SOCIETIES

The Law Society of Alberta (admitted 7 July 1970)
The Canadian Bar Association
The Edmonton Bar Association

PUBLICATIONS

The Perpetuities Act, Alberta. 5 RECENT LAWS IN CANADA 89. Montreal: Iris Publications, 1974.

ILLEGITIMACY. Background Paper No. 10. Edmonton: Institute of Law Research and Reform, 1974.